Supreme Court, U.S.
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No. 10-544

IN THE

Supreme Court of the United States

Frank Gangi,

Petitioner,

v.

Verizon New England, Inc., d/b/a Verizon Massachusetts *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Communications Act of 1934, as amended, rates for interstate telephone calls fall within the exclusive authority of the Federal Communications Commission (FCC). *See* 47 U.S.C. §§ 152(a), 201(a)-(b). State commissions are authorized to regulate rates for intrastate calls and to approve, and resolve disputes over, interconnection agreements (ICAs) between telecommunications carriers within their jurisdictions. *See id.* §§ 152(b), 252(a)-(b). In 2001, the FCC determined that all calls to the internet are "jurisdictionally interstate" and established rate caps for internet-bound calls. In this case, the First Circuit, applying a "presumption against preemption" in conflict with the law of the Ninth and Second Circuits and rulings of this Court, held, in conflict with the law of the D.C. and Fourth Circuits, that the state commissions nonetheless retained authority to impose charges on the intrastate portions of certain calls to the internet. It further held, in conflict with decisions of the Third, Seventh and Eleventh Circuits, that a carrier's failure to present its ICA dispute to a state commission for decision in the first instance did not bar claims in federal court. The questions presented are:

1. Whether, after rulings such as that made by the FCC in 2001, states retain authority to regulate rates for the intrastate portion of telephone calls to (or from) the internet?

2. Whether parties to a state commission-approved ICA may seek disputed interconnection charges in court without having first obtained a determination from the state commission?

PARTIES TO THE PROCEEDINGS BELOW

Global NAPs, Inc. was the plaintiff, counterclaim defendant and appellant in the court of appeals.

Global NAPs New Hampshire, Inc., Global NAPs Realty, Inc., Global NAPs Networks, Inc., Ferrous Miner Holdings, Ltd. and Petitioner Frank Gangi, were counterclaim defendants and appellants in the court of appeals.

Chesapeake Investment Services, Inc., 1120 Hancock Street, Inc., 321 Heath Street Realty Trust, CJ3, Inc. and RJ Equipment, Inc., were counterclaim defendants in the district court, but were not parties in the court of appeals.

Verizon New England Inc. d/b/a Verizon Massachusetts was the defendant, counterclaim plaintiff and appellee in the court of appeals.

The Massachusetts Department of Telecommunications and Energy, Paul B. Vasington, in his capacity as Commissioner, James Connelly, in his capacity as Commissioner, W. Robert Keating, in his capacity as Commissioner, Deirdre K. Manning, in her capacity as Commissioner and Eugene J. Sullivan, Jr., in his capacity as Commissioner were defendants in the district court but were not parties in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank Gangi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The court of appeals' decision (Pet. App. 1a-50a) is reported at 603 F.3d 71. The decisions of the district court (Pet. App. 51a-74a, 112a-115a), and the Massachusetts state commission (Pet. App. 116a-216a), are unreported.

JURISDICTION

The court of appeals for the First Circuit issued its decision on April 29, 2010. Pet. App. 1a. The court of appeals denied a timely petition for rehearing and rehearing en banc on June 7, 2010. Pet. App. 217a-219a. On August 10, 2010, Justice Breyer granted an extension of thirty days to and including October 6, 2010. No. 10A160. On September 24, 2010, Justice Breyer granted a further extension to and including October 20, 2010. *Id.* This Court has jurisdiction under 28 U.S.C § 1254(1).

RELEVANT STATUTORY PROVISIONS

Reproduced in an appendix to this brief are the relevant provisions of (1) the Communications Act of 1934, Pub. L. 416, 48 Stat. 1064; and (2) the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

STATEMENT OF THE CASE

The issues in this case arise out of ambiguities in the Telecommunications Act of 1996 (TCA), as it affects federal and state jurisdiction over internet telephony and provides a role for agencies and courts in resolving intercarrier compensation disputes.

I. Statutory And Regulatory Background

A. Telecommunications Act

1. Until 1996, regulatory authority over telephony in America was divided between the FCC and the states, with the FCC exercising exclusive jurisdiction over interstate communications and the states regulating intrastate communications. *See, e.g.*, 47 U.S.C. § 152(a) (granting FCC jurisdiction over interstate communications); *id.* § 201 (assigning FCC responsibility for issuing regulations to ensure that rates for interstate calls are just and reasonable); *id.* § 152(b) (stating that the FCC's jurisdiction does not extend to intrastate communications); *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148 (1930).

2. The FCC's authority was augmented by the TCA,[1] passed by Congress, "to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical

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[1] 47 U.S.C., various sections including §§ 251, 252.

networks required to supply telecommunication services."[2]

Under the 1996 Act, the FCC gained power to create pricing rules for intercarrier compensation even at the local level, while retaining its jurisdiction over interstate traffic. *See* 47 U.S.C. § 251(i).

Also, the TCA assigned new duties to state commissions. Having required incumbent local exchange carriers (ILECs) to interconnect their networks with those of competitive local exchange carriers (CLECs),[3] the new entrants with innovative technologies, the TCA deputized state commissions to oversee and arbitrate ICAs between CLECs and ILECs. *Id.* §§ 252(a)-(h).

The TCA also established an intercarrier compensation scheme of "reciprocal compensation" for interconnected carriers. *Id.* § 251(b)(5). Under this arrangement, two carriers exchanging calls between two locations share revenues, with the carrier whose customer initiated the call paying the carrier that terminates the call. *Id.* This is in contrast to the system of access charges which existed previously, under which the carrier originating or terminating the call bills the carrier who has carried the call across an exchange[4] (an interexchange call).

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[2] *See Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1118 (9th Cir. 2003).

[3] 47 U.S.C. §§ 251(c)(2).

[4] An exchange is a local calling area. *See* Pet. App.80a; 47 U.S.C. §153(25).

B. Disputes Over Control Of Intercarrier Compensation For Dial-Up Internet Calls

When the TCA was passed, dial-up internet access was emerging commercially. This technique allowed subscribers to, through CLECs, call internet service providers (ISPs) (*e.g.* Earthlink) to chat or send e-mails via the internet. ISPs obtained and distributed to their users, phone numbers which allowed those users to reach them through calls that often appeared to be local.[5]

The advent of internet telephony necessitated determining whether the federal government or the states had responsibility for determining intercarrier compensation for calls to ISPs and whether such calls could be separated into successive "legs" for purposes of jurisdiction over rates.

1. The FCC's 1999 Declaratory Ruling

The FCC made its first attempt to resolve these issues in 1999, when it was asked to decide whether ISP-bound calls were subject to reciprocal compensation. Incumbent carriers like Verizon complained that they were short-changed for ISP-bound calls because the ISP customers of CLECs

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[5] These numbers are known as "VNXX" or "virtual NXX" numbers. VNXX calling has sometimes been referred to as "FX" (foreign exchange) or "seven digit calling," since no area code would be needed if the assigned number was local to the carrier serving the ISPs.

rarely made outgoing calls for which they would owe the incumbents reciprocal compensation.[6]

In response, the FCC issued its *Declaratory Ruling*, concluding that reciprocal compensation was not owed on ISP-bound calls,[7] determining that reciprocal compensation was only required under the TCA for local calls. *See Declaratory Ruling* ¶¶1, 7, 8. The Commission recognized that ISP-bound calls traveled through intermediate switching points within the boundaries of a state, *id.* ¶10, but concluded that, viewed end-to-end, calls to the internet – which reach servers, users, and websites around the nation and across the world – are predominately interstate.[8]

When this order was challenged in the D.C. Circuit, the court held that the Commission had failed to adequately explain its conclusion that only local traffic was subject to reciprocal compensation. *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, 7-8 (D.C. Cir. 2000). The court thus vacated and remanded the order. *Id.* at 5.

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[6] *See generally WorldCom Inc. v. FCC*, 288 F.3d 429, 431 (D.C. Cir. 2002).

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689, 1999 WL 98037 (1999) (*Declaratory Ruling*).

[8] *Id.* ¶12.

2. *The FCC's 2001 ISP Remand Order*

In 2001, the FCC issued its *ISP Remand Order*.[9] It reiterated its view that ISP-bound calls are jurisdictionally interstate, rejecting again the suggestion that such calls may be viewed as two separate calls, one intrastate and the other interstate.[10] But it acknowledged that its prior order had erroneously indicated that the availability of reciprocal compensation turned on whether the call was local or interstate.[11] The new order declared that even if ISP-bound calls otherwise fell within the statutory provision providing for reciprocal compensation, the Commission could exercise its authority under two other provisions – § 201 and § 251(g) – to cap reciprocal compensation rates on ISP-bound calls at $.0007 per minute.[12]

The FCC explained that the price cap was a first step toward "decreas[ing] reliance by carriers on carrier-to-carrier payments,"[13] and moving toward a "bill and keep" system under which carriers would not receive any compensation for ISP-bound calls

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[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers—Intercarrier Compensation for ISP-bound Traffic*, CC Docket Nos. 96-98, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) (*ISP Remand Order*).

[10] *Id.* ¶¶57, 62, 64 n. 122.

[11] *Id.* ¶¶45-46.

[12] *Id.* ¶¶8, 23, 30.

[13] *Id.* ¶7.

from other carriers, but would bill only their own clients.[14]

The Commission also made clear that the interim rate constituted the full extent of intercarrier compensation permitted for such calls. *See, e.g., ISP Remand Order* ¶7 ("[W]e conclude, based upon all the evidence in this record, that these rates are *appropriate limits on the amounts recovered from other carriers*") (emphasis added); *id.* ("Specifically, we adopt a declining cap on the *amount that carriers may recover from other carriers for delivering ISP-bound traffic.*") (emphasis added). In addition, the Commission preempted any authority of state commissions to set their own rates for any portion of ISP-bound calls. *ISP Remand Order* ¶82 ("Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic ... state commissions will no longer have authority to address this issue.").

The *ISP Remand Order* was challenged in the D.C. Circuit, this time by Worldcom.[15] The D.C. Circuit rejected the Commission's asserted statutory support for its pricing order, but recognized that it likely had the authority elsewhere in the statute to impose rate caps. *Id.* at 434. Accordingly, the court remanded but declined to vacate the order. *Id.*

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[14] *See also In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 2001 WL 455872 (2001) ¶9.

[15] *WorldCom, Inc. v. FCC*, 288 F.3d at 430.

3. The FCC's Second Remand Order

The FCC responded to the remand only after the D.C. Circuit issued a writ of mandamus.[16] When it issued its *Second Remand Order* in 2008,[17] the Commission identified a new statutory basis for its pricing actions, relying on its authority to ensure that rates for *interstate* calls are "just and reasonable," 47 U.S.C. § 201, an authority expressly preserved by the 1996 Act, *id.* § 251(i). *See Second Remand Order* ¶21.

The Commission also reaffirmed that the interim rates in its prior order would continue to be the exclusive rates for all ISP-bound traffic. *See id.* ¶21 ("Consequently, in the *ISP Remand Order*, the Commission properly exercised its authority under section 201(b) to issue pricing rules governing the payment of compensation between carriers for ISP-bound traffic.").

Additionally, the FCC reiterated that its removal of ISP-bound calls from the reciprocal compensation regime did not depend on the calls being local. *Id.* ¶7. It explained that section 251(b)(5) applies to all telecommunications, which were "not limited geographically ('local,' 'intrastate'

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[16] *In re Core Communications, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (*Core 2008*).

[17] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (Released November 5, 2008) (*Second Remand Order*).

or 'interstate') or to particular services ('telephone exchange service,' 'telephone toll service' or 'exchange access')." *Id.* ¶8.

An affiliated carrier, Core Communications, appealed to the D.C. Circuit, as did the National Association of Regulatory Commissioners (NARUC) and various state commissions[18] who argued that the FCC did not have authority to "usurp" the role of the states in regulating compensation for the internet-bound traffic coming through their states.[19] The D.C. Circuit, however, rejected the state appellants' arguments and unanimously affirmed.[20]

C. Disputes Over Jurisdiction To Resolve Disputes Arising Under ICAs

The TCA engendered disputes not only about compensation for calls to the internet, but also over which tribunals should resolve interpretive disputes arising under the ICAs mandated by the Act.

The TCA expressly authorizes state commissions to resolve through negotiation or arbitration disputes regarding the formation of an ICA,[21] subject to federal court review of the final decision. 47 U.S.C. § 252(e)(6). But the statute is silent with respect to resolution of post-formation disputes. In time, courts reached a general consensus that state commissions

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[18] *Core Communications, Inc. v. Federal Communications Comm'n*, 592 F.3d 139, 144 (D.C. Cir. 2010).

[19] NARUC Br., at 27.

[20] *Core Communications, Inc. v. Federal Communications Comm'n*, 592 F.3d at 141.

[21] 47 U.S.C. §§252(b)(1), 252(e).

have authority under the Act to resolve disputes under ICAs,[22] but confusion remained about whether an ICA dispute had to be determined by a state commission in the first instance.

II. Factual Background

Petitioner Frank Gangi is the sole owner of Global NAPs Inc. (Global), a Quincy, Massachusetts-based CLEC which entered the dial-up internet business in the late 1990s. Global asserted its right to interconnect with Verizon New England (Verizon) so that Verizon subscribers in the state desiring to "dial up" to the internet could do so through Global. Like many other CLECs entering the market, Global contracted with ISPs to deliver calls to their servers. The ISPs were given "virtual" local telephone numbers which, when called, connected the ISPs' customers to Global's switch in Quincy, which then transferred or sent the calls to the ISPs, which would connect the callers to an internet destination.

Under this arrangement, Global collected reciprocal compensation from Verizon, which was eventually capped at $.0007 per minute. Although Verizon and the other ILECs had obtained the cap, the FCC had not provided them with any way to recoup the money they had paid the CLECs in reciprocal compensation. Thus, they turned to the various state commissions.

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[22] *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 480 (5th Cir. 2000); *Southwestern Bell Tel. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 496 (10th Cir. 2000).

Verizon sought permission from the Massachusetts state commission to charge Global interexchange access charges (*i.e.*, local long distance tolls) for the intrastate portion of any VNXX call to the internet.[23] Global resisted, arguing that the FCC's *ISP Remand Order* precluded the state commission from authorizing access charges on ISP-bound traffic.[24] The state commission disagreed and authorized Verizon to draft an ICA clause imposing charges based on applicable tariffs.[25] However, the commission never specified which of Verizon's tariffs could properly be applied to such calls (there being no tariff specific to VNXX ISP-bound calls), leaving the issue of applicable charges unclear.[26]

III. Proceedings In District Court And The First Circuit

Armed with the state commission order, Verizon attempted to charge Global $.0565 per minute for calls made by Verizon customers to Global's ISP clients, a rate 80 times the $.0007 capped rate for reciprocal compensation, the highest rate Verizon would have had to pay Global for facilitating its ISP-bound traffic. Believing the charges to be unlawful due to being preempted, Global refused to pay.

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[23] Pet. App. 148a-150a, 159a-162a.

[24] Pet. App. 147a; Global NAPs Inc. Initial Br., *Docket 02-45*, at 13-14, Global NAPs Inc. Reply Br., at 6., *available at* http://db.state.ma.us/dtc/frmDocketList.asp

[25] Pet. App. 152a-154a, 164a-165a.

[26] *See* Pet. App. 152a-154a, 164a-165a.

1. When Verizon refused to pay it reciprocal compensation, Global brought suit in Massachusetts federal district court and Verizon counterclaimed, alleging that Global had breached the ICA by refusing to pay the access charges Verizon had assessed.[27] On cross-motions for summary judgment on the counterclaim, the district court ruled in Verizon's favor, upholding the state commission's authority to impose the access charges.[28]

2. Global appealed.[29] The First Circuit invited the FCC to file an amicus brief addressing the State's authority to authorize access charges on internet-bound calls. The FCC staff filed a brief observing that "the *ISP Remand Order* is replete with references to 'ISP-bound calls' that do not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas."[30] However, the staff explained that it lacked authority to give a binding interpretation of the FCC's order on behalf of the Commission.[31]

In the absence of definitive guidance from the FCC, the First Circuit concluded that the *ISP Remand Order* was too ambiguous to preempt the Massachusetts state commission order.[32] Although the court acknowledged that the FCC considered all

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[27] *See* Pet. App. 10a.

[28] Pet. App. 114a-115a.

[29] Pet. App. 75a.

[30] FCC Amicus Br. at 11.

[31] *Id.* at 13.

[32] Pet. App. 103a.

ISP-bound traffic to be jurisdictionally interstate, and without disputing that the FCC ordinarily exercises exclusive jurisdiction over interstate traffic, the court nonetheless resolved the ambiguity in favor of permitting dual conflicting state and federal regulation over rates for interexchange calls to the internet. Pet. App. 103a. In doing so, the court relied on a generic presumption against federal preemption concluding that "the law requires a clear indication that an agency intends to preempt state regulation." Pet. App. 101a.

3. In the interim, the Third Circuit issued its opinion in *Core v. Verizon*, upholding a district judge's grant of Verizon's 12(b)(1) motion on the grounds that federal courts lack jurisdiction to enforce ICA claims until the claimant has prevailed in the cognizant state commission.[33]

Once back in district court, Global filed its own 12(b)(1) motion, patterned on Verizon's successful motion. Global argued that Verizon's claim that Global violated the ICA had to be definitively resolved by the cognizant state commission, which, having arbitrated the agreement, had first instance jurisdiction.[34] The district judge denied the motion.[35]

Shortly before the damages trial in Nov. 2008, the FCC issued its *Second Remand Order*. Based on that Order's pronouncements, Global moved to

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[33] *See Core Communications, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 344 (3d Cir. 2007).

[34] Pet. App. 71a

[35] Pet. App. 72a-73a.

dismiss Verizon's claims, arguing that the 2008 order conclusively established that the FCC had preempted the states from imposing any pricing controls on any segments (or legs) of internet-bound traffic. The district court denied this motion, stating that its prior determination on the issue was "law of the case."[36]

After resolving all the parties' interpretive disputes over the meaning of their ICA in Verizon's favor, the district court awarded Verizon $57 million for unpaid access charges, including interest. Pet. App. 63a. It further granted default judgment for Verizon on a veil-piercing claim, thus holding Petitioner personally liable for the entirety of the judgment.[37]

4. Global again appealed to the First Circuit, contending, in its first argument to the court, that the Commission's 2008 clarification order firmly established that the FCC had since 2001 preempted state commissions from imposing state tariff charges on any segment of ISP-bound traffic. The court of appeals acknowledged that the FCC had relied on its power "to regulate all ISP traffic" in its 2001 order and that "[t]he *Second Remand Order* did describe ISP-bound traffic as both 'interstate' and 'interexchange.'" Pet. App. 19a. However, it nonetheless concluded that the FCC's preemptive intent was still insufficiently clear to overcome the supposedly applicable presumption against preemption. Pet. App. 20a.

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[36] *See Conference Transcript* (November 18, 2008), at 7-8.

[37] *See* Pet. App. 51a-52a.

The court also rejected Global's second argument that the district court erred in not remanding the case to the state commission for first instance interpretation of contract issues relevant to determining the damages owed.[38] The court acknowledged that "courts remain uncertain" whether "state commissions must or should first interpret and enforce ICAs, and when federal courts have jurisdiction over ICA-enforcement actions," citing cases in which 12(b)(1) motions like Global's had been granted. Pet. App. Pet. App. 21a (collecting cases). The court concluded, however, that any requirement that Verizon first present its claims to the state commission was waivable and that Global had waived it by failing to raise its objection earlier in the litigation.[39]

REASONS FOR GRANTING THE WRIT

The First Circuit's holding that state commissions may impose access charges on the intrastate legs of dial-up calls to the internet creates an untenable conflict with the decisions of other circuits over a question of national importance. In applying a strong presumption against preemption of state regulation of interstate communications, the court of appeals created a direct conflict with decisions from the Second and Ninth Circuits, which recognized that in the area of interstate communications, over which the federal government has assumed power, there is no place for a generic

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[38] Pet. App. 25a

[39] *See id.*

presumption against preemption. That misapplication of the preemption standard – which has broad consequences throughout telecommunications law – led to the First Circuit's second error: construing the relevant FCC orders to allow fifty different state commissions to impose their own rate regulation on the intrastate portion of many calls to the internet, drastically undermining the FCC's efforts to establish uniform, national regulation on interstate modes of communication.

That decision cannot be reconciled with the rulings of other circuits, the plain meaning of the FCC orders, or sound public policy.

Further, such reasoning has contributed to a widespread confusion. Both courts and state commissions have used this erroneous reasoning to incorrectly determine relative responsibilities of the states and the federal government in an area in which legal certainty is of critical importance to encouraging investment and innovation. A particularly egregious example of this effect has been the state commissions' use of the First Circuit decision in their challenges to the FCC's jurisdiction over voice over internet protocol (VoIP) traffic —a quickly growing type of traffic traveling from the internet— over which the FCC has exercised its jurisdiction by declaring it to be interstate. In this way, the First Circuit decision continues to do damage to fledgling technologies.

The First Circuit again misconstrued the proper division of responsibilities between states and the federal government when it allowed the district court to resolve in the first instance interpretive conflicts over the meaning of an interconnection agreement

approved, and in part written, by a state commission. That decision also cannot be squared with the rulings of other courts of appeals and contributes to disarray in the lower courts, with the result that non-expert lower courts will issue rulings that expert state regulators would not have allowed.

I. The First Circuit's Preemption Ruling Conflicts With Decisions Of This Court And Other Lower Courts, As Well As The Plain Meaning Of The FCC's Orders.

In finding that the FCC's regulation of compensation for internet-bound calls did not preempt state imposition of additional charges on the same traffic, the First Circuit applied the wrong legal standard and reached the wrong conclusion, in conflict with the decisions of this Court and others.

A. The First Circuit's Presumption Against Preemption Conflicts With The Law Of The Second And Ninth Circuits And The Decisions Of This Court.

The First Circuit's decision rests fundamentally on its application of a generic presumption against preemption through federal agency action absent "a clear indication that the agency intend to preempt state regulation." Pet. App. 20a, 101a (citing *Hillsborough Co. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 718 (1985) (an FDA case)).

The Ninth Circuit reached the opposite conclusion in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003). Considering a preemption argument under the Telecommunications Act, *id.* at 1130, the court agreed that "[o]rdinarily, we . . . apply a presumption

against preemption," *id.* at 1136. "However," it explained, "'when the State regulates in an area where there has been a history of significant federal presence,' the presumption usually does not apply." *Id.* (citations omitted). The court then recognized that regulation of interstate telecommunications fell within that exception, holding that "we do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications."[40] *Id.*; *see also Qwest Corp. v. Ariz. Corp. Comm'n*, 567 F.3d 1109, 1118 (9th Cir. 2009) ("[B]ecause of the long history of federal presence in regulating long-distance telecommunications, the presumption against preemption does not apply.").

The Second Circuit, in *New York SMSA Ltd. v. Town of Clarkstown*,[41] recently agreed with this reasoning, stating that "[t]he presumption [against preemption] has not generally been applied when a local government regulates in an area 'where there has been a history of significant federal presence.'" *Id.* at 104 (quoting *Ting*, 319 F.3d at 1136.) Stating that "[t]he federal government has long regulated telecommunications, and in passing the Telecommunications Act, Congress took further steps 'to facilitate nationally the growth of wireless telephone service,'" the court held that the FCC had

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[40] The *Ting* court ended up finding that the state consumer fraud regulations at issue had not been preempted by the FCC because they did not conflict with the FCC's control over interstate traffic charges encompassed in sections 201 and 202 of the Telecommunications Act. *Ting*, 319 F.3d at 1146.

[41] 612 F.3d 97, 104 (2d Cir. 2010).

preempted local regulation of wireless telephone service, a type of service, which like, dial-up service, the TCA was enacted to promote. *Id.* at 105.

In so concluding, the Ninth and Second Circuits were faithful to the decisions of this Court recognizing that the presumption applied by the First Circuit here has no place in areas of traditional federal jurisdiction, where the dominance of the federal government has clearly been established. *See, e.g., Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001); *United States v. Locke*, 529 U.S. 89, 108 (2000).

Indeed, in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999), this Court directly rejected any assertion that the traditional presumption against preemption applied to deciding whether the Telecommunications Act of 1996 assigned authority for implementing the Act's new local competition provision to the FCC, in derogation of State authority. *Id.* at 377 n.6.

The case in favor of a presumption against preemption is even weaker here. Given that the FCC exercised its power to regulate ISP-bound traffic in service of a clearly federal, uniform regime, and that it declared ISP-bound traffic to be "jurisdictionally interstate," thus making it a type of traffic that has been historically subject to exclusive federal regulation, it was error for the First Circuit to apply a presumption against preemption.

B. The First Circuit's Preemption Decision Conflicts With The Plain Meaning Of The FCC's Orders.

The First Circuit compounded its analytical error by turning a blind eye to the FCC's manifest intent to establish an exclusive method of intercarrier compensation for internet-bound calls, leaving no room for additional rate-setting by the states.

1. As stated above, in 2001, the FCC specifically assumed jurisdiction over all ISP-bound calls by declaring them interstate based on an end-to-end analysis, thus subjecting them to its jurisdiction in their entirety as a matter of law.[42]

In its 2008 *Second Remand Order*, the FCC affirmed its analysis[43] and repeated that it had authority under section 201 to regulate all intercarrier compensation for ISP-bound traffic precisely because "the ISP-bound traffic at issue here is clearly interstate in nature." *Second Remand Order* ¶17.

The First Circuit should have realized, as did the Eighth Circuit, that when the FCC assumes jurisdiction over communications containing both intrastate and interstate components and declares those communications to be jurisdictionally interstate, the states are prohibited from exercising jurisdiction over the instate components of that communication through the use of a non-end-to-end analysis. *See Vonage Holdings Corp. v. Nebraska*

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[42] *ISP Remand Order* ¶¶ 57-58.

[43] *See generally ISP Remand Order* ¶21, n. 69.

Public Service Commission, 564 F.3d 900, 905-906 (8th Cir. 2009) (holding that the FCC properly preempted the Nebraska Service Commission from regulating nomadic voice over internet protocol traffic, which, due to its containing intrastate and interstate segments, the FCC had declared to be jurisdictionally interstate.).

2. The First Circuit nonetheless concluded that the FCC had chosen not to exercise the full extent of its jurisdiction over these jurisdictionally interstate calls, preempting everything except access charges for the intrastate portion of interexchange calls to the internet. But the texts of the orders clearly demonstrate the opposite – the FCC asserted exclusive authority to set a single rate for what it viewed as a single call to the internet through a comprehensive regime.

In its 2001 Order, the FCC used the broadest possible terms to describe the scope of its pricing order, declaring that it was establishing an "intercarrier compensation regime," *ISP Remand Order* ¶82, that would provide "a declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic," *id.* ¶7. *See also, e.g., id.* ¶7 ("[W]e conclude, based upon all the evidence in this record, that these rates are *appropriate limits on the amounts recovered from other carriers.*") (emphasis added).

If there were basis to doubt that the orders left no room for state imposition of additional – much less offsetting – charges, the FCC removed it when it directly addressed the preemptive scope of its order. It declared that because it was "exercis[ing] [its] authority under section 201 to determine the

appropriate intercarrier compensation for ISP-bound traffic" – a phrase that plainly encompasses the entirety of the payments to be made between carriers for ISP-bound calls – "state commissions will no longer have authority to address this issue." *ISP Remand Order* ¶82 (emphasis added).

The First Circuit's conclusion that "appropriate intercarrier compensation for ISP-bound calls" did not include charges for the intrastate leg of interexchange calls to ISPs is thus flatly contradicted by the plain language of the 2001 Order. If any doubt remained, it was removed by the Commission's 2008 order, which specifically explained that "although ISP-bound traffic falls within the scope of" the provision governing reciprocal compensation, "this interstate, *interexchange* traffic" – that is, traffic that is jurisdictionally interstate because it is headed to the internet, and "interexchange" because it often travels between calling areas within the same state (*i.e.*, would otherwise be subject to the local-long distance access charges the Massachusetts commissioned imposed in this case) – "is to be afforded different treatment from other . . . traffic pursuant to our authority under section 201 and 251(i)," which assign to the FCC exclusive jurisdiction over interstate calls. *Second Remand Order* ¶6 (emphasis added).

The petitioner state commissions challenging this order in the D.C. Circuit thus rightly recognized that the order "usurp[s]"[44] state pricing authority over the instate segments of ISP-bound calls, and has

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[44] NARUC Br. at 13, 27.

the effect of "diminishing the scope of State commission jurisdiction (and duties) under current law." NARUC Br. at 14.

3. The FCC recently confirmed its longstanding position in a brief to this Court, opposing certiorari in two cases seeking review of the D.C. Circuit's most recent decision upholding the FCC's *Second Remand Order*. *See* Brief in Opp., *Core Commun., Inc. & Penn. Pub. Util. Comm'n v. FCC*, Nos. 10-185 & 10-189 (Oct. 12, 2010). The brief explains that the *Second Remand Order* exercised the Commission's "authority to regulate *ISP-bound traffic* (and to issue pricing rules)," *id.* at 9 (emphasis added),[45] and rejects the contention that states retain authority to divide that traffic into interstate and intrastate components in order to regulate a portion of the call, *id.* at 13, n.6.

C. The First Circuit's Interpretation Of The FCC's *ISP Remand Orders* Conflicts With Interpretations By The Fourth And D.C. Circuits And Numerous State Commissions.

The First Circuit's decision is also inconsistent with the interpretation other circuits and state commissions have given the FCC orders.

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[45] *See also id.* at 12 (noting that the subject matter of the case is the "FCC's compensation rules for dial-up Internet access").

1. The Rulings Of The First And Ninth Circuits Conflict With The Rulings Of Other Courts, Including The Fourth And D.C. Circuits.

In contrast to the decision in this case, several other circuits have recognized that the FCC's *ISP Remand Order* precludes states from exercising any authority over the pricing of internet calls.

The D.C. Circuit's order affirming the *Second Remand Order* is based on an understanding of the scope of that order that is irreconcilable with the decision in this case. As stated *supra*, the First Circuit read the FCC orders to permit disaggregating internet calls into distinct legs, some of which (namely, interexchange legs) could still be regulated by state commissions. Pet. App. 20a. The D.C. Circuit, in contrast, understood that the FCC had expressly rejected the claim that calls to the internet were subject to such divisions and that a portion of a call could be deemed to terminate within a state. The D.C. Circuit thus affirmed the Commissions' end-to-end analysis, *Core Communications*, 592 F.3d at 144, and explained that

> Given that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has *no significance* for the FCC's § 201 jurisdiction over interstate *communications that these telecommunications might be deemed to "terminat[e]" at a LEC for purposes of § 251(b)(5).*

Id. (emphasis added).

The Fourth Circuit expressed the same understanding of the Commission's orders in analyzing the effect of the *ISP Remand Order* on an ICA pricing dispute in *Verizon Maryland, Inc. v. Global NAPs Inc.*, 377 F.3d 355, 367 (4th Cir. 2004). It explained that:

> In ISP Order No. 2 the FCC adopted a new compensation regime (bill-and-keep) to govern ISP-bound calls and announced that it was *stripping state commissions of any authority to formulate the compensation regime for such calls. See ISP Order No. 2* at ¶¶ 77-82 (emphasis added).

Id. at 367 (emphasis added).[46]

The Ninth Circuit, on the other hand, has relied on the decision in this case to conclude that a state commission may impose intrastate charges on interexchange segments of ISP-bound calls. *Verizon California Inc. v. Peevey*, 462 F.3d 1142, 1158 (9th Cir. 2006).[47]

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[46] In 2005, a Connecticut, district judge applied the same reasoning to find that the FCC's *ISP Remand Order* applies to all portions of ISP-bound traffic, including FX (VNXX) traffic, stating "[t]he ISP Remand Order covers all ISP-bound traffic, without exception." *Southern New England Tel. Co. v. MCI WorldCom Commc'ns, Inc.*, 383 F. Supp. 2d 287, 299 (D. Conn. 2005) (internal citations omitted).

[47] *But see Pacific Bell v. Pac West*, 325 F.3d at 1125 (concluding that the *ISP Remand Order* preempts generic state regulation of ISP-bound calls).

2. Conflict Also Exists Between State Commissions, And Between State Commissions And Their Respective Circuits.

Of equal significance, the question presented here has generated widespread conflict and confusion among state commissions over the scope of their authority over internet calls, leading in some cases to an unseemly conflict between state commissions and the courts of appeals for the federal circuits in which they sit.

Commissions in Illinois,[48] Texas,[49] and North Dakota[50] read the FCC Orders as covering all segments of all ISP-bound traffic. Consequently, these commissions have concluded that they lack

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[48] *Essex Telecom Inc. v. Gallatin River Communications, LLC*, Case No. 01-0427 (Order issued July 24, 2002) at 3,8; *Global NAPs Illinois Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North, Inc., f/k/a GTE North Inco. And Verizon South, Inc. f/k/a GTE South Inc.*, Docket No. 02-0253 (Arbitration Decision issued October 1, 2002) at 17.

[49] *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, PUC Docket No. 24015, Revised Arbitration Award (Order on Clarification Issued on Jan. 5, 2005) (Tex. PUC) at 1-2.

[50] *Level 3 Communications LLC Interconnection Arbitration Application, Case No. PU-2065-02-465, Decisions and Recommendations of the Arbitrator Concerning Level 3 Communications, LLC's Interconnection Arbitration Application* (Issued March 3, 2003) (*N.D. PSC*) at 22-23, ¶¶91-94.

authority to impose access charges on interexchange calls to the internet even those facilitated by VNXX.

For example, the North Dakota commission has explained that:

> The intercarrier compensation associated with this [interexchange] traffic is beyond the [state] Commission's authority to decide as the FCC removed from the state's jurisdiction the ability to address the compensation mechanisms for ISP-bound traffic.[51]

In contrast, other state commissions, such as those in Ohio,[52] Washington[53] and Arizona,[54] adopt the same reading as the First Circuit, and have approved assessment of origination access charges on VNXX-facilitated interexchange calls to the internet in their states.

In some instances, the confusion has resulted in an untenable conflict between state commissions and

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[51] N.D. PSC ¶91.

[52] *In the Matter of Petition of Verizon Access Transmission Services Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with United Telephone Company of Ohio d/b/a Embarq*, Case no. 06-1485-TP-ARB, Arbitration Award (April 18, 2007) (Ohio PUCO) at 6, Order on Rehearing (Issued July 25, 2007).

[53] *Final Order Upholding Initial Order; Granting in part and Denying in part Petitions for Administrative Review; Modifying Initial Order Approving Settlement Agreement*, WUTC Docket UT-063038, Order 10 (Issued July 16, 2008) (*Final Order*) ¶160.

[54] *Complaint of Qwest Commissions Inc.*, ACC Docket No. T-0151B-05-0414, T-03654A-05-0415, Decision no. 68855 (Issued July 28, 2006) (*Complaint of Qwest*).

the relevant court of appeals. For instance, the Washington commission initially determined that the *ISP Remand Order* covered all ISP-bound traffic, and therefore refused to permit access charges for VNXX calls. *See Final Order* ¶¶36-37. The Arizona state commission reached the same conclusion.[55] In both cases, however, federal district courts reversed, applying Ninth Circuit precedent that took a contrary view.[56]

D. Confusion And Conflict Over The Preemption Issue Create A Problem of National Importance.

This conflict and confusion should not be allowed to persist. State commissions and carriers alike are entitled to a clear answer to two reasonable questions: what authority, if any, do state commissions retain over calls to the internet and what rates apply to those calls?

1. Congress enacted the TCA to establish a national, uniform method for regulating the nation's telecommunications system. That important purpose cannot be served when regulated entities cannot determine from whom they must seek permission to alter their rates and from whom they may seek relief when changing technologies require revision to established practices.

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[55] *Complaint of Qwest*, at 13.

[56] *Qwest Corp. v. Arizona Corp. Comm'n*, No. CV-06-2130-PHX-SRB (November 20, 2007), at 12; *Qwest v. Wash. Utils. and Transp.Comm'n*,484 F. Supp. 2d 1160, 1170 (W.D. Wash. 2007).

At present, internet traffic and its carriers are subject to dramatically different charges in different states. In some jurisdictions, incumbent carriers have succeeded in imposing charges beyond those authorized by the FCC sufficient to completely offset – and thereby nullify – the compensation the federal agency deemed the appropriate rate for intercarrier compensation for ISP-bound calls. Indeed, it is not too much to say that the jurisdictional dispute will, in many cases (including this one), determine the viability of competitive carriers that currently provide innovative, low-cost access to the internet for those who would otherwise lack any access to this critical medium.

The resulting unnecessarily high rates for internet access impede consumers' ability to purchase dial-up services, which still hold a significant share of the market, and is often the *only* kind of internet connection available to rural users. As stated by an FCC working paper, "[n]early one-third (29 percent) of them [dial-up users] live in rural areas", broadband being too difficult to install in remote parts of the country.[57] Dial-up also remains an important choice for non-rural users as it provides significant cost savings, in comparison to broadband.[58]

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[57] J. Horrigan, *Broadband Adoption and Use in America*, FCC OBI Working Paper Series No., 2010 WL 620692, at *4 (Feb. 23, 2010).

[58] "[D]ial-up is proving to be more resilient than expected, at least partly due to the recession, which has helped to prolong, or in some cases rekindle, demand for a slower but cheaper way to surf the Web." Andrew Lavallee, "Postponing Dial-up's

2. In addition, uncertainty concerning the preemptive effect of declaring traffic jurisdictionally interstate extends to the growing market for voice communications offered over the internet (so-called "VoIP" calls provided by companies like Vonage). In 2004, the FCC extended the reasoning of its dial-up ruling to calls from the internet (generally "nomadic VoIP calls," which are voice calls sent from portable internet-compatible equipment), declaring them also to be "jurisdictionally interstate."[59] The First Circuit's decision thus also exposes VoIP traffic to charges for intrastate "legs" of the interstate calls. Indeed, the Pennsylvania Public Utilities Commission already has relied on the First Circuit's decision in this case to assert its authority to impose charges on VoIP calls.[60] The New Hampshire Commission has reached the same conclusion, also pointing to the First Circuit's decision.[61]

Demise," (Published Feb. 26, 2009) *available at* http://online.wsj.com/article/SB123561717378378657.html

[59] *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 FCC Rcd.. 22404, 2004 WL 2601194 (2004) ¶18; *See also Minnesota P.U.C. v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[60] *Palmerton Telephone Company v. Global NAPs South Inc. and Other Affiliates*, C-2209-2093336. (March 16, 2010) at 16.

[61] *Petition of Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 NH PUC Order at 16 (citing *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006).

Thus, if allowed to remain in force, the First Circuit's ruling, and the rulings following it, threaten the ability of all internet telephony to realize its cost advantages over traditional telephony, undermining the pro-innovation goals of the TCA.

II. There Is A Pervasive Conflict And Confusion In The Circuits Over Whether Carriers May Bypass State Commissions In Disputes Over Interconnection Agreements.

The First Circuit's decision also contributes to ongoing uncertainty over the proper procedures for resolving disputes over the meaning of interconnection agreements that state commissions have approved, or in part imposed, in accordance with their duties under the Telecommunications Act of 1996. The Court should grant certiorari in this case to provide badly needed guidance.

A. Lower Courts Disagree Over The Allocation Of Authority Between State Commissions And Federal Courts For Resolving ICA Disputes.

A majority of circuit and district courts have held that a state commission is the only tribunal that can make first instance determinations on issues involving interpretation of the ICA it approved.

For instance, the Eleventh Circuit declared:

> [T]he language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the *first*

> *instance* and to subject their determination to challenges in the federal courts.

BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1277 (11th Cir. 2003) (en banc) (emphasis added). Congress chose this allocation of authority, the court explained, because

> [a] state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. A court might ascribe to the agreement a meaning that differs from what the state commission believed it was approving — indeed, the agreement as interpreted by the court may be one the state commission would never have approved in the first place.

Id. at n.9.[62]

In *Core Communications, Inc. v. Verizon Pa., Inc.*, the Third Circuit agreed, granting a motion by Verizon to dismiss a competitor's suit in federal court for lack of jurisdiction on the ground that the dispute should have been submitted first to the state commission. The Third Circuit, citing a prior FCC decision, explained that:

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[62] A district court within this circuit granted a 12(b)(1) motion as to an ICA interpretive issue not first presented to the state commission. *Intermedia Communications Inc. v. Bellsouth Telecomm., Inc.*, 173 F. Supp. 2d 1282, 1287 (M.D. Fla. 2000).

> [p]ursuant to the FCC's guidance, we hold that the interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement *must be litigated in the first instance* before the relevant state commissions.

Core Communications, 493 F.3d at 344 (emphasis added).

The Seventh Circuit subsequently agreed with the Third,[63] stating the Third Circuit's decision in *Core* represented a "sensible" way to administer the TCA.[64] Judge Posner explained that a disagreement over the meaning of an ICA

> should normally be referred to the state regulatory agency . . . before the federal court decides the case. The agency had to approve the parties' agreement and had the authority to impose a different agreement on them, or, what amounts to the same thing, to modify the agreement they had negotiated. 47 U.S.C. § 252(e)(1), (2). If a dispute over the meaning of the agreement arises, the agency will usually be in the best position to resolve it . . . .

Id. at 593. This result, Judge Posner went on to explain, is consistent with the doctrine of exclusive primary jurisdiction:

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[63] *Illinois Bell Tel. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 593-595 (7th Cir. 2008).

[64] *Illinois Bell Tel. v. Global NAPs Illinois, Inc.*, 551 F.3d at 594 (citing *Core Communications, Inc. v. Verizon Pa., Inc.*, 493 F.3d at 344).

> when 'in a suit involving a regulated firm but not brought under the regulatory statute itself, an issue arises that is within the exclusive original jurisdiction of the regulatory agency to resolve, although the agency's resolution of it will usually be subject to judicial review. When such an issue arises, the suit *must stop and the issue must be referred* to the agency for resolution.'

Id. at 595-96 (emphasis added).

Finally, consistent with these decisions, the Fifth and Tenth Circuits have likewise endorsed the proposition that state agencies have plenary jurisdiction over ICA disputes. *See Southwestern Bell Tel. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Southwestern Bell Tel. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d at 496. Accordingly, district courts within those circuits have granted Rule 12(b)(1) dismissals in ICA interpretation cases not first presented to state commissions.[65] District courts within the Sixth and Fourth Circuits have also granted 12(b)(1) motions in such cases.[66]

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[65] *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp. 2d 513, 549 (E.D. Tex. 2004); *Contact Communications v. Qwest Corp.*, 246 F. Supp. 2d 1184, 1189 (D. Wyo. 2003).

[66] *AT&T Communications of Ohio, Inc. v. Ohio Bell Tel.*, 29 F. Supp. 2d 855, 856-57 (S.D. Ohio 1998); *Bell Atlantic Virginia, Inc. v. WorldCom Technologies of Virginia*, 70 F. Supp. 2d 620, 626 (E.D. Va. 1999).

In contrast, the First Circuit here, and the Second Circuit in *Southern New England Telephone Co. v. Global NAPs Inc.*, No. 08-4518,---F.3d----, 2010 WL 3325962 (2d Cir. Aug. 25, 2010) (*SNET*), have refused to dismiss or remand the cases to be interpreted in the first instance by state agencies. Although the First Circuit did not deny the conclusion of other courts that Congress intended state commissions to take first responsibility for construing the agreements they approved, and often partially wrote, it decided that a party's failure to assert that state interest at an early stage of the litigation justified depriving the state commission of its congressionally intended prerogative. *See* Pet. App. 25a.

The Second Circuit has since agreed, stating that the TCA did not divest the district court of its federal question jurisdiction to hear a carrier's ICA-related claims in the first instance. *SNET*, 2010 WL 3325962 at *7.

These courts rejected the argument for mandatory remand to the state commission and opined that they were allowed to take a permissive approach to allowing district courts to have first instance jurisdiction over ICA cases.[67]

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[67] *SNET*, 2010 WL 3325962, at * 8 n. 4; Pet. App. 25a.

B. The First Circuit's Decision Is Contrary To The Goals Of The TCA And The Principle Of Exclusive Primary Jurisdiction.

Certiorari is warranted to correct the First Circuit's misapprehension of the division of authority contemplated by the TCA.

As the Seventh and Eleventh Circuits have explained, Congress delegated state commissions authority to approve – and if necessary, to impose through arbitration – the terms of complex interconnection agreements because of those agencies' expertise in the regulation of telecommunications. Congress also evinced its intent, in section 252(e)(6) of the TCA, to have district courts play the role of reviewing the interpretations of the state commissions. Having chosen to give that authority to expert commissions in the first instance, it is impossible to imagine that Congress intended to rely on non-expert, generalist federal judges to resolve any ambiguities in the agreements the state commissions approved, or even wrote, or to alter the role of the district courts as the reviewing courts. Accordingly, not even the First Circuit disputes that ordinarily, ICA disputes must be presented to, and resolved by, state commissions in the first instance.

The First Circuit nonetheless concluded that this requirement could be waived by failure to promptly request dismissal or remand from federal court when a carrier attempts to bypass a state commission in blatant disregard for the division of authority contemplated by the Act. But the rule petitioners invoke was not created for the benefit of the parties, but rather to ensure the proper functioning of the

statutory regime as a whole (in protection of the broader public interest) and out of respect for the authority Congress allocated to the states. Accordingly, other courts have properly treated it as a restriction on the adjudicatory authority of the federal courts, not as a personal affirmative defense. *Indiana Bell Co. v. McCarty*, 30 F. Supp. 2d 1100, 1104 (S.D. Ind. 1998); *AT&T Communications of Ohio*, 29 F. Supp. 2d at 857; *Intermedia Communications, Inc.*, 173 F. Supp. 2d at 1287; *Z-Tel Communications*, 331 F. Supp. 2d at 549 (dismissing cases under Fed. R. Civ. P. 12(b)(1)).

Pointing to this Court's decision in *Verizon Md. v. Md. Pub. Serv. Comm'n*, 535 U.S. 635, 641-42 (2002), the First and Second Circuits have insisted that federal courts obtain subject matter jurisdiction over ICA disputes so long as the claims involve federal questions or fall under some other kind of jurisdiction (in this case, for example, supplemental jurisdiction). Pet. App. 23a; *SNET*, 2010 WL 3325962 at *7. But the fact that a case may fall within a court's general subject matter jurisdiction does not mean that it is appropriate to exercise that jurisdiction when Congress has otherwise assigned first instance responsibility for resolving the claim in a state tribunal. *See, e.g.*, *SNET*, 2010 WL 3325962 at *8 (explaining that courts have subject matter jurisdiction but may nonetheless be required to use that jurisdiction to remand a case to a state commission). And nothing in *Verizon* supports the First Circuit's apparent view that a requirement that parties first present their claims to a state commission must be jurisdictional in order to be non-waivable. Instead, the Court in *Verizon* simply held that federal courts generally have federal question

jurisdiction to review a state commission's decision after the parties have submitted the dispute to that expert agency. The Court had no occasion to decide the question presented here – whether Verizon may bypass the state commission and present an interpretative dispute over an ICA directly to a federal court.

C. Achieving Uniformity In Requiring Submission To Cognizant State Commissions Is Of National Importance.

1. The range of disparate outcomes caused by circuit split makes granting this petition crucial. State commissions' role in the federal regime should not vary from circuit to circuit, or district court to district court, especially when those courts are faced with the same litigants.

For instance, after publication of the Third Circuit's decision in *Core*, Global filed a series of 12(b)(1) motions in pending cases in other circuits.[68] The motions evoked five judicial responses. In California, the district court granted the motion, concluding it was irrelevant that it was made two years into the litigation.[69] In Illinois, the district court granted the motion, except as to claims styled as arising under federal tariffs, and the Seventh Circuit affirmed (although on somewhat different

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[68] At the time, Global was involved in a number of disputes with incumbent carriers over compensation for calls traveling from the internet.

[69] *Pacific Bell Telephone Co. v. Global NAPS California, Inc.*, CV 05-7734 (C.D.C.A. October 1, 2007) at 19.

reasoning).[70] In Ohio, the court reinterpreted the *Core* rule as being a waivable exhaustion defense but concluded that the defense had not been waived since the litigation had not yet proceeded very far.[71] And in this case, the Massachusetts courts decided that Global had waived its right to dismissal.

The unsettled law in this area not only subjects litigants like Global to conflicting outcomes in otherwise identical cases, it also creates an opportunity for gamesmanship by incumbent carriers like AT&T and Verizon, firms now controlling over 60 percent of the U.S. telephone business. In fact, both carriers have alternately embraced both sides of the circuit split, moving to dismiss their competitors' claims for bypassing state commissions, only then to turn around and file claims in the first instance in federal court and then resist their adversaries' motions to dismiss. For instance, AT&T (under its present name and also as SBC Communications and as BellSouth Corporation), was able to obtain dismissal of rivals' claims in Florida, Texas, Ohio, and Indiana by claiming that a federal court did not have first instance jurisdiction over them,[72] while

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[70] *Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc.*, No. 06-C-3431, 2007 WL 4531790, at *4, 6 (N.D. Ill., Dec. 17, 2007); *Illinois Bell Tel. v. Global NAPs Illinois, Inc.*, 551 F.3d at 593-595.

[71] The court granted Global's motion, even though it was made one year after litigation had begun. *Ohio Bell Tel. v. Global NAPs Ohio Inc.*, No. 06-cv-549 (S.D. Ohio March 13, 2008) at 14.

[72] *See Indiana Bell Tel. Co.*, 30 F. Supp. 2d at 1104; *AT&T Communications of Ohio*, 29 F. Supp. 2d at 857; *Intermedia*

successfully attacking the rule in Connecticut,[73] then on appeal in the Second Circuit[74] and as an amicus on Verizon's behalf in the First Circuit in this case.[75] Similarly, Verizon, the firm that created the *Core* rule by winning 12(b)(1) dismissal in the Third Circuit, argued the exact opposite to the district court and circuit courts in this case, as well as to a state court in New York[76] and to the Second Circuit[77] as an amicus supporting AT&T.[78]

2. The First Circuit rule, in addition to ignoring persuasive reasoning of the rulings of the Eleventh and Third Circuits, creates uncertainty about where ICA cases are to start and when they must be remanded, while also violating the statutory scheme created by Congress. The Second Circuit's reasoning indicates that the split and uncertainty may well get worse if a uniform rule is not forthcoming from this Court.

Absent a definitive ruling, enforcement of the TCA will lack national uniformity, leaving ICA

Communications, Inc., 173 F. Supp. 2d at 1287; *Z-Tel Communications*, 331 F. Supp. 2d at 549.

[73] *Southern New England Tel.Co v. Global NAPs Inc.*, 2007 U.S. Dist. LEXIS 78061, at * 7 (D. Conn.).

[74] *SNET*, 2010 WL 3325962, *supra.*

[75] AT&T ILEC Companies Amicus Br. Case nos. 09-1308, 09-1309 (filed June 22, 2009) at 6-22.

[76] *Verizon New York v. Choice One Communications of New York, Inc.*, 865 N.Y.S.2d 213, 213 (App. Div. 2008).

[77] *SNET*, 2010 WL 3325962, *supra.*

[78] Verizon Telephone Companies Amicus Br., Case no. 08-4518-cv (filed July 14, 2009) at 6-23.

interpretation issues to be decided in some circuits by judges and in others by regulators. That is obviously not the legal regime Congress envisioned, and at this point, only this Court can restore the system Congress intended.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 20, 2010

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 09-1308, 09-1309.

GLOBAL NAPS, INC., Plaintiff/Counterclaim Defendant, Appellant,

v.

VERIZON NEW ENGLAND INC. d/b/a Verizon Massachusetts,
Defendant/Counterclaim Plaintiff, Appellee,

MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY; PAUL B. VASINGTON, in his capacity as Commissioner; JAMES CONNELLY, in his capacity as Commissioner; W. ROBERT KEATING, in his capacity as Commissioner; DEIRDRE K. MANNING, in her capacity as Commissioner; and EUGENE J. SULLIVAN, JR., in his capacity as Commissioner.,
Defendants,

v.

GLOBAL NAPS NEW HAMPSHIRE, INC.; GLOBAL NAPS REALTY, INC.; GLOBAL NAPS NETWORKS, INC.; FERROUS MINER HOLDINGS, LTD.; and FRANK GANGI,
Counterclaim Defendants, Appellants,

CHESAPEAKE INVESTMENT SERVICES, INC.; 1120 HANCOCK STREET, INC., 321 HEATH STREET REALTY TRUST; CJ3, INC.; and RJ EQUIPMENT, INC.,

Counterclaim Defendants.

DECIDED: April 29, 2010

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETS

[Hon. Rya W. Zobel, U.S. District Judge]

Before LYNCH, Chief Judge, BOUDIN and HOWARD, Circuit Judges.

LYNCH, Chief Judge.

Global NAPs, Inc. (GNAPs) appeals from entry against it of a judgment for $57,716,714 for access charges that GNAPs owed but failed to pay Verizon New England Inc. (Verizon) for services Verizon provided between 2003 and 2006. Concerned that GNAPs could not pay a judgment, Verizon also successfully brought counterclaims alleging alter ego liability and disregard of the corporate form against GNAPs; its owner, Frank Gangi; and several GNAPs affiliates. These defendants appeal from the district court's assertion of federal jurisdiction and grant of default judgment, which holds Gangi and the affiliates jointly liable for the sum GNAPs owes. We affirm.

In an issue of first impression for this court, we hold that 28 U.S.C. § 1367, enacted in 1990, gives

federal courts supplemental jurisdiction over both compulsory and at least some permissive counterclaims. This alters this circuit's former rule, adopted before the enactment of § 1367, that required permissive counterclaims to have an independent basis for jurisdiction. See McCaffrey v. Rex Motor Transp., Inc., 672 F.2d 246, 248 (1st Cir.1982). Our ruling brings us into line with the Second and Seventh Circuits, as we describe below. Jones v. Ford Motor Credit Co., 358 F.3d 205, 210-14 (2d Cir.2004); Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 384-87 (7th Cir.1996).

In 2002 the Massachusetts Department of Telecommunications and Energy (DTE) ruled that GNAPs must pay long-distance access charges to Verizon whenever ISP traffic is actually routed outside the caller's local area, regardless of the phone number the internet user dialed. GNAPs fought that ruling and did not pay any of those charges. Verizon terminated its service to GNAPs in 2006.

This is GNAPs' fifth appeal in a series of disputes between GNAPs and Verizon, which arose from GNAPs' efforts to avoid the DTE's ruling. See Global NAPs, Inc. v. Verizon New England, Inc. (GNAPs IV), 489 F.3d 13, 21-25 (1st Cir.2007) (affirming release of security GNAPs posted to obtain an injunction pending appeal after the injunction was vacated); Global NAPs, Inc. v. Verizon New England, Inc. (GNAPs III), 444 F.3d 59, 71-75 (1st Cir. 2006) (holding a 2001 FCC order did not preempt the state DTE's authority); Global NAPs, Inc. v. Mass. Dep't of Telecomm. & Energy, (GNAPs II), 427 F.3d 34, 43-49 (1st Cir.2005) (holding the Massachusetts DTE was

not bound under the Full Faith and Credit Clause to a Rhode Island agency's interpretation of the effect of an FCC order on GNAPs' and Verizon's Rhode Island agreement); Global NAPs, Inc. v. Verizon New England, Inc. (GNAPs I), 396 F.3d 16, 18-19 (1st Cir.2005) (holding GNAPs could not opt to use an agreement it had with Verizon in a different state after undergoing arbitration before the DTE).

GNAPs has appealed here again on a number of arguments, which challenge federal jurisdiction, the liability finding, and the amount of the damages assessed. We reject GNAPs' first argument, that it cannot be liable for any charges imposed pursuant to the DTE order because a 2008 Federal Communications Commission (FCC) order preempts the DTE's 2002 decision. The 2008 order is not materially different on this preemption issue from an earlier order, which we held did not preempt the DTE. GNAPs III, 444 F.3d at 69-75.

We also reject GNAPs' challenges to judgments against it on two of Verizon's counterclaims, one to enforce the DTE's order and recover long-distance access charges and the other to pierce GNAPs' corporate veil and hold Gangi and GNAPs' affiliates jointly liable. We reject the argument of all defendants that the district court lacked jurisdiction over these counterclaims. There is subject matter jurisdiction over both claims because 28 U.S.C. § 1367(a) gives courts supplemental jurisdiction over compulsory and at least some permissive counterclaims. Verizon's counterclaims are sufficiently related to the underlying litigation within the test set forth in § 1367(a) to fall under federal

courts' supplemental jurisdiction. We also reject GNAPs' argument that Verizon first had to ask the DTE to enforce its order before suing in federal court because GNAPs waived this exhaustion argument.

Finally, we affirm judgment on both counterclaims. We affirm the district court's calculation of damages GNAPs owes Verizon for failing to pay access charges under the DTE's order. We hold the district court did not abuse its discretion by granting default judgment on the claim to pierce GNAPs' corporate veil as a discovery sanction against GNAPs, Gangi, and three GNAPs affiliates: Global NAPs Networks, Inc. (GNAPs Networks), Global NAPs Realty (GNAPs Realty), and Global NAPs New Hampshire (GNAPs New Hampshire) (collectively, the GNAPs companies). Evidence these defendants committed misconduct and spoliation was compelling. And we affirm that collateral estoppel barred GNAPs' holding company, Ferrous Miner Holdings, Ltd. (Ferrous), from challenging these discovery-misconduct findings.

I.

Some pertinent background information, setting up the issues in this appeal, may be helpful. Our prior decisions give further background, and we assume familiarity with them.

A. The Telecommunications Act and Interconnection Agreements

The Telecommunications Act of 1996 (TCA), now over a decade old, has promoted greater competition in the telecommunications industry. See GNAPs II, 427 F.3d at 36. It requires local carriers to "interconnect" with each other's networks, pursuant to interconnection agreements (ICAs). Id. at 36-37; See also 47 U.S.C. §§ 251(a), 252. Carriers can voluntarily negotiate terms and, after an impasse, can ask state commissions to set terms in binding arbitration. 47 U.S.C. § 252(a)-(b).

Those ICAs must specify how the carriers will share fees from local calls. Id. § 252(a)(1). Section 251(b)(5) requires carriers to pay "reciprocal compensation" for local calls, in which the carrier for the customer making the call shares fees with the carrier that terminates the call. For long-distance calls (known as "interexchange" traffic), in contrast, the long-distance carrier pays "access charges" to the carriers that originated and terminated the call. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Local Competition Order), 11 F.C.C.R. 15499, 16012-14, 1996 WL 452885 (1996) (distinguishing local and interexchange fees).[1]

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[1] The FCC determined in 1996 that reciprocal compensation under § 251(b)(5) applies only to local calls and ruled that long-distance carriers still must pay access charges, as they did before the TCA. See Local Competition Order, 11 F.C.C.R. at 16013; See also GNAPs III, 444 F.3d at 63.

The TCA sets some federal requirements for all ICAs, 47 U.S.C. § 251(b)-(c), but leaves some room for state regulation. For example, carriers must submit all ICAs-even those negotiated privately-to state commissions, which can require that ICAs meet local regulations. See Id. § 252(e). If parties undergo arbitration, the TCA somewhat limits state commissions' discretion to set terms. See Id. § 252(b)-(d). Carriers may ask a federal court to review whether a state commission's decision under § 252 conforms to the TCA. Id. § 252(e)(6).

B. Factual Background

At issue in this case is what charges Verizon and GNAPs owe each other from dial-up internet traffic between some of their customers. For our purposes, Verizon's customers were dial-up internet users; GNAPs' customers were the ISPs that connected Verizon's customers to the internet. Because dial-up service uses telephone lines, these calls were networked like a phone call. A Verizon customer's modem dialed a phone number belonging to GNAPs' ISP customer. The ISP's server equipment "answered" that call and connected the user to websites. In early 2002, GNAPs and Verizon began renegotiating a new ICA for calls from Verizon's Massachusetts customers to these ISPs.

ISP calls do not fit the traditional reciprocal-compensation scheme and can produce windfall profits for ISPs' carriers, like GNAPs. ISPs receive many long calls, entitling their providers to large reciprocal-compensation fees from the internet

customer's carrier (here, Verizon). But ISPs do not make calls, defeating the reciprocal arrangement. The FCC has long sought a solution to this problem. See Core Commc'ns, Inc. v. FCC, 592 F.3d 139, 141-43 (D.C.Cir.2010) (describing that history).

GNAPs further exploited this imbalance by giving its ISP customers virtual NXX (VNXX) phone numbers. Unlike normal numbers, VNXX numbers do not reflect the actual location of the number's owner.[2] GNAPs gave its ISP customers VNXX numbers that would appear local to the internet user, Verizon's customers. But the ISP was often in fact located out of the internet user's calling area. In other words, apparently local calls were often networked as long-distance calls.

GNAPs has argued to the DTE[3] and in court that VNXX numbers that appear local-even if the ISP is actually located elsewhere-are subject to reciprocal compensation. Verizon has argued that it should be able to charge access charges and not have to pay reciprocal compensation for any calls that are routed to an ISP outside a Verizon customer's local area.

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[2] Carriers normally determine the location of call participants by the second string of three digits in their phone numbers, called the NXX. The NXX corresponds to the physical location of a "switch" that routes a call. The switch is located near the owner of the phone number and thus can "serve[ ] as [a] prox[y] for geographic location." GNAPs III, 444 F.3d at 64.

[3] The DTE's name was recently changed to the Department of Telecommunications and Cable. For simplicity, we use DTE.

On December 12, 2002, after arbitration, the Massachusetts DTE sided with Verizon. It ordered the parties to adopt an ICA requiring them to pay reciprocal fees for genuinely local calls and GNAPs to pay access charges when an ISP was actually located outside the internet customer's local area. The DTE ordered GNAPs to inform Verizon where its ISP customers were located so Verizon could properly bill GNAPs.

This ICA went into effect on January 27, 2003, and Verizon began billing GNAPs. For three years, GNAPs fought the DTE's ruling and did not pay access charges. It also did not give Verizon information about its ISP customers' locations. Verizon terminated its service to GNAPs in April 2006. This appeal concerns Verizon's efforts to collect three years of overdue access charges.

II.

GNAPs sued Verizon in federal district court in Massachusetts on December 30, 2002. After GNAPs litigated and lost an argument in 2005 that it could opt into a different ICA and avoid the DTE's order, See GNAPs I, 396 F.3d at 24-28, the parties turned to the meat of GNAPs' lawsuit. GNAPs claimed that a 2001 FCC order preempted the DTE's authority to decide rates for all ISP traffic, including VNXX interexchange traffic, relying on In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (ISP Remand Order), 16 F.C.C.R. 9151, 2001 WL 455869 (2001).

On April 11, 2006, this court disagreed with GNAPs and held that the ISP Remand Order only clearly regulated local traffic. GNAPs III, 444 F.3d at 71-75. Applying the presumption against preemption, we ruled the ISP Remand Order did not govern interexchange VNXX traffic and upheld the DTE's order. Id.

Earlier, on January 12, 2005, GNAPs had filed a separate lawsuit to obtain payment from Verizon for charges GNAPs said Verizon owed it. GNAPs claimed that the ISP Remand Order and another, related FCC order[4] imposed reciprocal rates of $0.0007 on all ISP traffic. GNAPs sought its purported share of reciprocal fees from Verizon. The district court consolidated this suit with GNAPs' lawsuit claiming preemption.

Verizon responded to GNAPs' 2005 lawsuit by counterclaiming for the access charges GNAPs owed under the DTE's 2002 order. Verizon claimed breach of contract, specifically of the ICA. In September 2006, after GNAPs had litigated and lost its preemption claim, the district court granted Verizon's motion for judgment on the pleadings on GNAPs' 2005 complaint.

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[4] See Petition of Core Communications for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, 19 F.C.C.R. 20179, 20184-86, 2004 WL 2341235 (2004) (refusing to forbear enforcing the rate cap set in the ISP Remand Order and not mentioning or expressly changing the ISP Remand Order's preemption provisions).

That left Verizon's counterclaim for breach of the ICA. The parties began conducting discovery on GNAPs' liability and potential damages on that claim in late 2006. It was not until June 2007, however, that GNAPs argued for the first time that Verizon had to bring its claim to enforce the ICA to the state commission (here, the DTE) before suing in federal court. The district court rejected that argument.

On November 5, 2008, the FCC issued a new order addressing its authority to regulate ISP traffic, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic (Second Remand Order), 24 F.C.C.R. 6475, 2008 WL 4821547 (2008). That order did not arise out of this dispute but addressed different issues. The district court, on November 18, 2008, rejected GNAPs' argument that the Second Remand Order made the clear statement of preemption that the ISP Remand Order had lacked earlier and preempted the DTE order.

By late 2008, the district court was also ready to resolve Verizon's counterclaim to enforce the ICA. It concluded that this court's decision rejecting GNAPs' original preemption claim "established Verizon's right to collect ... access charges" and that "the only question [wa]s the amount due."[5] As we explain in

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[5] GNAPs had dismissed all other claims it raised in its earlier lawsuit to obtain final judgment and appeal the court's rejection of its preemption argument based on the ISP Remand Order.

more detail below, to determine that amount, the court had to resolve how many minutes of VNXX calls were subject to the DTE's order that GNAPs pay access charges-meaning the court had to exclude any local calls subject to reciprocal compensation and any calls made to GNAPs customers outside Massachusetts and not under the DTE's order. The court then had to decide what rate per minute GNAPs owed for access charges and any interest.

The parties agreed how many total minutes of VNXX traffic were at issue. The court applied judicial estoppel against GNAPs on two key issues, the rate per minute of access charges and the percentage of GNAPs customers that were in Massachusetts and subject to the DTE's order. The court held GNAPs was bound to representations it had made on both issues when seeking an injunction while litigating its preemption claim in 2005.

The district court resolved the final two issues-the percentage of calls that were local and the amount of interest on summary judgment. The parties' experts had originally agreed on the percentage of local traffic. The court rejected GNAPs' expert's tardy "revised" report, filed one week before trial, which estimated a higher percentage of local traffic, as well as a Verizon employee's e-mail that GNAPs insisted created an issue of fact. The court held the ICA set interest rates for overdue charges. It granted judgment for Verizon for $57,716,714.

Well before obtaining judgment, Verizon feared that GNAPs would not pay any judgment it owed. By 2006 it began to suspect that GNAPs was transferring its assets to avoid paying a judgment. The district court permitted Verizon to attach GNAPs' assets in September 2006. Verizon says it discovered there was less than $1 million in GNAPs' name.

Verizon amended its counterclaim on December 4, 2006, alleging that GNAPs commingled and hid its assets. The amended counterclaim added to count one, which again claimed breach of the ICA, two new counts: count two claimed fraudulent transfer of assets and count three claimed alter ego liability and disregard of the corporate form.

The counterclaim added new defendants whom Verizon alleged should share GNAPs' liability. Three GNAPs affiliates became defendants: GNAPs New Hampshire, which acts as the "banker" for all GNAPs companies, receiving and disbursing their money so they can pay their bills; GNAPs Networks, which manages GNAPs' infrastructure; and GNAPs Realty, which holds GNAPs' property and leases. The amended counterclaim also added as defendants Ferrous, a holding company that owns all of these entities, and Frank Gangi, founder and sole shareholder of Ferrous.[6] All of these companies, including

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[6] Verizon included two other defendants and added several others in a second amended complaint filed in 2008. The district court did not hold these defendants responsible for GNAPs' liabilities. Verizon does not challenge that decision and those defendants are not parties to this appeal.

GNAPs, are pass-through entities that pay their income to their shareholder, Frank Gangi, who pays their taxes.

The defendants unsuccessfully moved to dismiss counts two and three as permissive counterclaims that needed, and lacked, an independent basis for federal jurisdiction. Meanwhile, the defendants resisted Verizon's requests for discovery of their financial records. Beginning on December 1, 2006, the district court issued a series of orders rejecting GNAPs' repeated efforts to block discovery.

Evidently GNAPs and the other defendants were resisting discovery orders in a Connecticut district court as well. On July 1, 2008, that court granted default judgment against GNAPs, the GNAPs companies, and Ferrous for willful discovery violations. S. New England Tel. Co. v. Global NAPs, Inc. (SNET), 251 F.R.D. 82, 96 (D.Conn.2008). The SNET court found substantial evidence the defendants had concealed and destroyed evidence. Id. at 90-95.

In October 2008, Verizon moved for entry of default judgment as a sanction for discovery violations by all defendants. After a three-day evidentiary hearing in December, the district court granted default judgment on count three, which alleged alter ego liability and disregard of the corporate form, against GNAPs, Gangi, and the GNAPs companies. It also held Ferrous was

collaterally estopped from disputing the findings in the SNET decision and granted default judgment on count three against Ferrous as well. The court held all counterclaim defendants jointly and severally liable with GNAPs for the full judgment amount.

The defendants appeal.

III.

A. The FCC's 2008 Second Remand Order Does Not Preempt or Establish that the FCC's 2001 Order Preempted the DTE's Authority to Impose Rates for Interexchange ISP Traffic

GNAPs argues that the FCC's 2008 Second Remand Order[7] establishes that the 2001 ISP Remand Order preempted intercarrier compensation for all ISP-bound traffic and so preempts the DTE's 2002 decision that GNAPs must pay access charges for interexchange VNXX traffic. We review that preemption claim de novo. GNAPs III, 444 F.3d at 70-71.

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[7] All remand orders refer to FCC orders, as identified.

In GNAPs III we held that the FCC, in the 2001 ISP Remand Order, exercised only its authority to regulate local ISP traffic and did not preempt state authority to regulate interexchange ISP traffic. Id. at 72, 75. We distinguished between the FCC's assertion of regulatory authority and its exercise of that authority. Id. at 71. Even if the FCC had authority to regulate all ISP traffic, the ISP Remand Order was intended to resolve regulatory-arbitrage problems with reciprocal compensation for local traffic. Id. at 74. We explained that the FCC had to clearly state its intent to preempt state authority to regulate access charges for interexchange traffic as well, which the ISP Remand Order did not explicitly do. Id. at 72-74. We ruled the ISP Remand Order therefore did not preempt the DTE's decision. Id. at 75.

GNAPs argues that the FCC's 2008 Second Remand Order made it clear that its 2001 order had preempted the DTE order. Not so. The Second Remand Order is not materially different from the ISP Remand Order on the issues of concern to us, and our holding in GNAPs III applies to this case as well. GNAPs' argument to the contrary misreads the 2008 order's language.

The 2008 Second Remand Order simply clarified the legal basis for the authority the FCC had asserted in earlier orders to regulate local ISP traffic and prevent regulatory arbitrage. See Second Remand Order, 24 F.C.C.R. at 6476-78. The order was a response to a ruling of the D.C. Circuit Court of Appeals that a legal basis for the ISP Remand Order's assertion of jurisdiction likely existed, but that order had rested on the wrong jurisdictional

ground.[8] Id. Thus, the issues the FCC addressed in the 2008 order did not go to regulation of intercarrier compensation for interexchange ISP traffic.

The Second Remand Order relied on § 201 of the TCA instead. Second Remand Order, 24 F.C.C.R. at 6483-86. The D.C. Circuit upheld that jurisdictional basis. Core Commc'ns, 592 F.3d at 141.

The 2008 Second Remand Order did not change the 2001 ISP Remand Order's rate regime or preemptive effect, as the D.C. Circuit has recognized. To the contrary, that order "instituted substantially the same rate cap system" as the ISP Remand Order. Core Commc'ns, 592 F.3d at 142; See also Second Remand Order, 24 F.C.C.R. at 6486-89 (continuing the rate system in the ISP Remand Order). As the FCC told the D.C. Circuit in Core Communications, that rate system applies "when two [carriers] collaborate to deliver calls to an ISP within a local calling area." Brief of FCC at 21, Core Commc'ns, 592 F.3d 139 (emphasis added). The Second Remand Order did not revisit (or mention) preemption of ISP-bound traffic at all.

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[8] The ISP Remand Order relied on § 251(g) of the TCA to impose interim reciprocal-compensation rates of $0.0007 per minute for ISP traffic and to preempt state commissions' authority to set different rates in the future. ISP Remand Order, 16 F.C.C.R. at 9171-74. The D.C. Circuit remanded but did not vacate that order, reasoning that the FCC likely had authority to impose those rates but not under § 251(g). WorldCom, Inc. v. FCC, 288 F.3d 429, 430 (D.C.Cir.2002).

The Second Remand Order's express purpose was to justify-not change-a particular rate system. We held, in GNAPs III, that system applied only to local ISP traffic. GNAPs' contrary argument takes language in the Second Remand Order out of context and ignores the purpose of the order.[9]

GNAPs notes that the order concluded that § 251(b)(5)'s reciprocal-compensation scheme does not apply only to "local" traffic. The FCC was merely ruling that § 251(b)(5) is not limited to traditional telephone local traffic but to all forms of telecommunications, including ISP traffic. Id. at 6479-83. The FCC was rejecting its prior interpretation that § 251(b)(5) did not include ISP traffic at all.[10] Id. It was not, however, distinguishing local and interexchange ISP traffic, which is the pertinent question for us.[11]

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[9] Because we hold the Second Remand Order does not preempt interexchange ISP traffic, we do not reach GNAPs' argument that the district court erred by concluding the order is not retroactive.

[10] In its first attempt to solve the reciprocal-compensation imbalance ISP traffic creates, the FCC had ruled that ISP traffic was exempted from § 251(b)(5)'s reciprocal compensation scheme altogether. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 14 F.C.C.R. 3689, 3697-98, 1999 WL 98037 (1999). It reasoned that ISP traffic terminates at the website, not the internet server, and therefore is never local. Id. The D.C. Circuit vacated that order, holding that the FCC's understanding of ISP traffic was likely wrong. Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1, 9 (D.C.Cir. 2000).

[11] GNAPs misleadingly argues that the Second Remand Order says that reciprocal compensation "is not limited

The Second Remand Order did describe ISP-bound traffic as "interstate" and "interexchange." 24 F.C.C.R. at 6475. But that does not mean the FCC was preempting interexchange fees, as GNAPs urges. The FCC was explaining why it had jurisdiction to regulate ISP traffic under § 201 of the TCA, which permits the FCC to impose rates and regulations that further the TCA's goals on interstate telecommunications traffic. See 47 U.S.C. § 201; See also Core Commc'ns, 592 F.3d at 143. GNAPs' argument misses the point that "[a] matter may be subject to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation." GNAPs III, 444 F.3d at 71. Here, the FCC has not exercised jurisdiction over interexchange traffic. Our conclusion that the FCC preempted only state regulation of local ISP traffic remains unaffected.

GNAPs also observes the order discusses "intercarrier compensation" rather than "reciprocal compensation" and urges us to conclude that the order intended to reach reciprocal fees as well as access charges. The Second Remand Order does not assign such significance to this language or even mention access charges. Instead, it expressly preserved the rate scheme in the ISP Remand Order

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geographically." The order actually says that the TCA's definition of telecommunications is not geographically limited and concludes that "telecommunications" includes ISP traffic and not merely local phone service. Second Remand Order, 24 F.C.C.R. at 6479.

that we have held governs only local ISP traffic. Isolated words cannot overcome the Second Remand Order's text or the presumption against preemption. See GNAPs III, 444 F.3d at 71-72.

GNAPs' argument fails. We turn to GNAPs' arguments that the federal courts could not hear Verizon's counterclaims for payment of access charges.

B. Jurisdictional Issues

GNAPs argues no federal jurisdiction exists over Verizon's two successful counterclaims, count one to enforce the ICA and count three alleging alter ego liability and disregard of the corporate form. GNAPs also argues that Verizon failed to exhaust its administrative remedies by not first seeking to enforce the ICA in the DTE.

We reject GNAPs' argument that there is no federal jurisdiction and hold that 28 U.S.C. § 1367 confers jurisdiction over compulsory and at least some permissive counterclaims. We also hold GNAPs waived its exhaustion argument and do not reach the merits.

1. Federal Jurisdiction over Count One, Verizon's Counterclaim to Enforce the ICA

GNAPs first argues that Verizon improperly enforced the ICA in federal court rather than first

asking the DTE to interpret and enforce the agreement. Although § 252 of the TCA details how parties, states, and federal courts can draft and approve ICAs, it is silent on how and in what fora parties can enforce ICAs. Among other issues, courts remain uncertain whether state commissions can enforce ICAs,[12] whether state commissions ever must or should first interpret and enforce ICAs,[13] and

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[12] The TCA is silent on whether state commissions can interpret and enforce ICAs or simply approve them. The Supreme Court and this court have not yet answered that question, See Verizon Md., Inc. v. Pub. Serv. Comm'n (Verizon Md. I), 535 U.S. 635, 641-42, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), and we need not do so now. Most circuits, however, have held that state commissions have that authority. See, e.g., Sw. Bell Tel., L.P. v. Pub. Util. Comm'n, 467 F.3d 418, 422 (5th Cir.2006); E.Spire Commc'ns, Inc. v. N.M. Pub. Regulation Comm'n, 392 F.3d 1204, 1207 (10th Cir.2004); Iowa Network Servs., Inc. v. Qwest Corp., 363 F.3d 683, 691-92 (8th Cir.2004); BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1277 (11th Cir.2003) (en banc); MCI Telecomms. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 337-38 (7th Cir.2000). The FCC has reached this conclusion as well. In re Starpower Commc'ns, LLC, 15 F.C.C.R. 11277, 11280, 2000 WL 767701 (F.C.C.2000).

[13] Compare Core Commc'ns, Inc. v. Verizon Pa., Inc., 493 F.3d 333, 342-44 (3d Cir.2007) (holding that state commissions must first interpret and enforce ICAs), and BellSouth Telecomms., 317 F.3d at 1277-78 (holding that state commissions first must interpret and enforce ICAs and federal courts can then review that decision), with Ill. Bell Tel. Co., Inc. v. Global NAPs Ill., Inc., 551 F.3d 587, 593-96 (7th Cir.2008) (Posner, J.) (holding that state commissions have "primary jurisdiction" over difficult issues particularly within their competence that arise from ICA-enforcement disputes, which federal courts can choose to invoke).

when federal courts have jurisdiction over ICA-enforcement actions.[14] We need not decide these issues here, but they undergird the parties' disputes.

GNAPs argues that even if federal courts hypothetically have jurisdiction over claims to enforce ICAs, the proper procedure is for state commissions-here, the DTE to first interpret and enforce an ICA, after which federal courts may review that decision under 47 U.S.C. § 252(e)(6). It concludes that Verizon's claim is premature.

Verizon rejects GNAPs' prematurity argument as based on two questionable assumptions: first, that state commissions have the authority under the TCA to enforce interconnection agreements, and second, that any implicit authority in state commissions is meant to be exclusive and prevents federal courts from hearing ICA-enforcement claims otherwise properly before them. Verizon contends that its ICA-enforcement claim is properly in federal court, either because there is federal question jurisdiction over the

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[14] The Supreme Court held that federal courts at least have jurisdiction over claims that federal law preempted a state commission decision regarding an ICA. Verizon Md. I, 535 U.S. at 642-43 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)). The Fourth Circuit held that ICAs are so bound with federal law that actions to enforce them arise under federal law. Verizon Md., Inc. v. Global NAPs, Inc. (Verizon Md. II), 377 F.3d 355, 362-65 (4th Cir. 2004). The Seventh Circuit took a more nuanced view, opining that garden-variety enforcement claims are creatures of state contract law, though some claims could create federal-question jurisdiction. Ill. Bell, 551 F.3d at 591-93.

claim under 28 U.S.C. § 1331 or, at a minimum, there is supplemental jurisdiction under 28 U.S.C. § 1367.

We need not decide the first point, whether state commissions can hear ICA-enforcement claims, because we conclude Verizon's counterclaim is properly in federal court. We think it is clear that, at a minimum, there is supplemental jurisdiction under § 1367[15] over Verizon's counterclaim to enforce the ICA. We agree with Verizon that Congress did not withdraw that jurisdiction to hear this counterclaim in the TCA. See Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 644, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (holding that § 252 of the TCA "at least does not divest the district courts of their authority under 28 U.S.C. § 1331"); See also United States v. Lahey Clinic Hosp., Inc., 399 F.3d 1, 9 (1st Cir.2005) (noting that a "strong presumption against implied repeals of federal statutes" is perhaps even stronger when the federal statute in question confers federal jurisdiction).

Verizon's counterclaim is more than sufficiently related to GNAPs' complaint. Both parties' claims ultimately arise from a dispute over the same agreement and involve the same basic factual question: what fees the carriers owe each other. See, e.g., BellSouth Telecomm., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1176 (11th Cir.2001)

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[15] We decline Verizon's invitation to rule on the different question of whether we have independent federal question jurisdiction under § 1331 over its claim to enforce an ICA.

(reviewing a claim seeking declaratory judgment that an ordinance was preempted and a counterclaim to enforce the ordinance); see also 6 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1410, at 70-72, 78-79 (1990) (noting that courts generally find claims that are logically related arise from the same transaction and reporting that courts have held that some claims based on the same contract are sufficiently related).

Given the existence of jurisdiction, we treat GNAPs' prematurity argument as a type of administrative-exhaustion argument.[16] Arguments that a party failed to exhaust its administrative remedies are waivable unless an exhaustion requirement is jurisdictional. See Frederique-Alexandre v. Dep't of Natural & Envtl. Res., 478 F.3d 433, 440 (1st Cir.2007). And exhaustion requirements are not jurisdictional unless Congress has explicitly designated them as such. See Arbaugh v. Y & H Corp., 546 U.S. 500, 516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). The TCA does not mention an exhaustion requirement, let alone limit subject matter jurisdiction.

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[16] GNAPs has expressly disavowed any desire for us to invoke the discretionary doctrine of primary jurisdiction, and so we do not. GNAPs asks us to dismiss the case and let the DTE resolve it in the first instance, the procedure for administrative exhaustion. Reiter v. Cooper, 507 U.S. 258, 268-69, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993).

GNAPs is wrong in suggesting that, under Illinois Bell, we could hold that the DTE has exclusive primary jurisdiction and dismiss the case. GNAPs ignores that opinion's plain statement that the court was invoking discretionary and not exclusive primary jurisdiction. Ill. Bell, 551 F.3d at 595-96.

Without suggesting that there would be, on these facts, any merit to the argument, we hold GNAPs has waived it. GNAPs did not raise this argument until nearly two years after Verizon filed its counterclaim, and only after GNAPs' other arguments had been rejected. It would be inequitable to allow GNAPs to sandbag its opponent at this late stage, and it would disserve judicial economy.[17]

2. Jurisdiction over Verizon's Counterclaim for Alter Ego Liability and Disregard of the Corporate Form

GNAPs makes a different and more complicated argument that there is no federal jurisdiction over count three, which alleged alter ego liability and disregard of the corporate form against GNAPs and the other defendants. GNAPs argues that at most this counterclaim is permissive, not compulsory. As

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[17] As a result, we do not comment on decisions GNAPs cites in support of its argument that, at least sometimes, parties must first ask state commissions to interpret ICAs. See Ill. Bell, 551 F.3d 587, 594-95; Core Comm'cns, 493 F.3d at 344; BellSouth Telecomms., 317 F.3d at 1277-78.

such, GNAPs concludes, the counterclaim is outside federal courts' supplemental jurisdiction and requires an independent basis for jurisdiction. We hold that we have supplemental jurisdiction over this counterclaim, regardless of whether it is compulsory or permissive.

This court has not before considered the scope of statutory supplemental jurisdiction over counterclaims. The supplemental jurisdiction statute, 28 U.S.C. § 1367, was enacted in 1990. Some decisions before the enactment of § 1367 adopted a rule that federal courts could exercise supplemental jurisdiction over compulsory but not permissive counterclaims.[18] E.g., McCaffrey, 672 F.2d at 248; see also 6 Wright et al., supra § 1422, at 169-70. Permissive counterclaims needed to have an independent federal jurisdictional basis. McCaffrey, 672 F.2d at 248; 6 Wright et al., supra § 1422, at 169-70.

This distinction arose from judge-made law of jurisdiction over what are now called supplemental claims-claims that lack an independent basis for

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[18] In one case after enactment of the supplemental jurisdiction statute in 1990 we did note the rule that permissive counterclaims required an independent basis for jurisdiction. Iglesias v. Mut. Life Ins. Co. of N.Y., 156 F.3d 237, 241 (1st Cir.1998). Iglesias assumed that "Section 1367 incorporates the common law doctrines of pendent and ancillary jurisdiction," Id. at 241, which, we explain below, the Supreme Court has since squarely rejected, See Allapattah, 545 U.S. at 558-59. We will therefore reconsider this issue. See, e.g., Muskat v. United States, 554 F.3d 183, 189 (1st Cir. 2009).

federal jurisdiction-law which evolved in the absence of explicit congressional authorization. Put simply, courts distinguished jurisdiction over pendent claims-those brought by the plaintiff-and ancillary claims-those brought by other parties.[19] Pendent claims had to arise from the same "common nucleus of operative fact" as the underlying claim having a basis for federal jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Lower courts held that ancillary claims, such as counterclaims, had to arise from the same transaction or occurrence. See W.A. Fletcher, "Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the Gibbs Test, 74 Ind. L.J. 171, 174-75 (1998); 13 Wright et al., Federal Practice and Procedure § 3523, at 176-77 (3d ed. 2008). The Supreme Court never reconciled these lines of cases. See generally 13 Wright et al., supra § 3523, at 157-85 (tracing this history); W.C. Perdue, Finley v. United States: Unstringing Pendent Jurisdiction, 76 Va. L.Rev. 539, 541-51 (1990) (same).

Courts drew the line for ancillary jurisdiction at the transaction-or-occurrence test for practical reasons. Some counterclaims needed to be raised to avoid preclusion in a later proceeding. Courts, hesitant to expand federal judicial power, limited

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[19] Jurisdiction over other parties was even more complicated; those nuances are not relevant in this case. See generally, e.g., Allapattah, 545 U.S. at 552-57, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).

supplemental jurisdiction to counterclaims which had to be raised or waived: that is, compulsory counterclaims arising out of the same transaction or occurrence as the underlying suit. See Channell, 89 F.3d at 385; 13 Wright et al., supra § 3523, at 177.

Not all courts agreed. Judge Friendly rejected the conventional view. See United States v. The Heyward-Robinson Co., Inc., 430 F.2d 1077, 1088 (2d Cir.1970) (Friendly, J., concurring). So did Judge Becker. Abromovage v. United Mine Workers of Am., 726 F.2d 972, 988-90 (3d Cir.1984). They and some commentators criticized this rule as historically and legally unsound and unwise. See Jones, 358 F.3d at 210-12 (describing that debate).

In 1990 Congress enacted a supplemental jurisdiction statute, 18 U.S.C. § 1367. The statute does not use the terminology of "permissive" or "compulsory." It gives federal courts supplemental jurisdiction over all claims that are part of the same Article III case or controversy:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). This language confers jurisdiction over all claims that are part of the same Article III case, subject to two exceptions, listed in subsections (b) and (c), which do not apply here.[20]

Subsection (c) allows district courts to decline to exercise supplemental jurisdiction when "the claim raises a novel or complex issue of State law," when the supplemental claim "substantially predominates over" the underlying claim properly in federal court, when "the district court has dismissed all claims over which it had original jurisdiction," or "in exceptional circumstances." The district court in this case did not opt to decline jurisdiction.

By its plain text, then, § 1367(a) governs supplemental jurisdiction over counterclaims. See Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558-59, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) (interpreting § 1367(a)'s plain text, which confers a "broad grant of supplemental jurisdiction"). We join two circuits and virtually all commentators

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[20] Subsection (b) restricts supplemental jurisdiction in diversity cases over some kinds of claims, but not counterclaims brought under Rule 13. See 28 U.S.C. § 1367(b); Allapattah, 545 U.S. at 559-60, 125 S.Ct. 2611. Specifically, it excepts, in diversity actions, "claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure" and claims by people seeking to join under Rule 19 or intervene under Rule 24. 28 U.S.C. § 1367(b). These claims must meet all requirements for diversity jurisdiction. Id. This list does not include Rule 13, and in any event this case was not brought in diversity.

in holding that Article III's case-or-controversy standard is the jurisdictional limit for counterclaims. Jones, 358 F.3d at 212-13; Channell, 89 F.3d at 385; See also, e.g., C.D. Floyd, Three Faces of Supplemental Jurisdiction after the Demise of United Mine Workers v. Gibbs, 60 Fla. L.Rev. 277, 290 (2008).

In so doing, we hold that § 1367 supersedes case law on supplemental jurisdiction that had distinguished between compulsory and permissive counterclaims. Accord Jones, 358 F.3d at 212; Channell, 89 F.3d at 385. The statute's plain text does not distinguish or limit jurisdiction over counterclaims, though it imposes other limits. See 18 U.S.C. § 1367(a)-(b). And as the Supreme Court observed, "nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary." Allapattah, 545 U.S. at 558-59, 125 S.Ct. 2611. Thus §1367 abolishes the conceptual framework underpinning the old compulsory permissive counterclaim distinction.

We need not define the outer boundary of the phrase "so related ... that [the claims] form part of the same case or controversy under Article III" to decide this case, and we will not do so here. Much scholarly commentary has debated the meaning of "case" and

"controversy"[21] in Article III, as well as in § 1367(a), and the question is a difficult one.[22]

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[21] Many scholars have argued that those terms have very different meanings, which could affect federal jurisdiction. See R.J. Pushaw, Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 Notre Dame L.Rev. 447, 450-518 (1994) (citing other scholars and proposing a historical interpretation). This debate does not affect our analysis in this case. See id.

[22] This difficulty arises in part because civil procedure has changed dramatically since the framing of the Constitution, and it is not clear what an Article III "case" means in contemporary practice.

At the time of the framing, American courts used the English common law "cause of action" to govern procedure. See, e.g., A.J. Bellia, Article III and the Cause of Action, 89 Iowa L.Rev. 777, 782-92 (2004); See also Osborn v. Bank of U.S., 22 U.S. (9 Wheat) 738, 823, 6 L.Ed. 204 (1824); R.A. Matasar, Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction, 71 Cal. L.Rev. 1399, 1479-87 (1983).

But the Federal Rules of Civil Procedure made civil procedure more flexible by liberalizing rules for joining claims and parties in civil cases. See J.T. Molot, How Changes in the Legal Profession Reflect Changes in Civil Procedure, 84 Va. L.Rev. 955, 986 (1998). This practice is incongruent with the scope of traditional causes of action. See Bellia, supra, at 792-99.

In 1966 the Supreme Court defined an Article III case as one comprised of claims arising from a "common nucleus of operative fact," such that the plaintiff "ordinarily would be expected to try them in one judicial proceeding." Gibbs, 383 U.S. at 725, 86 S.Ct. 1130. Gibbs rejected earlier cases defining jurisdiction by a "cause of action" as unduly narrow and confusing. 383 U.S. at 722-25, 86 S.Ct. 1130. The Court adopted a theory of a case-factual relatedness-that motivated the

In this case we need only decide that supplemental jurisdiction is somewhat broader than the transaction-or-occurrence test. No Supreme Court case had ever established the same transaction-or-occurrence test as the boundary of Article III case-or-controversy requirement. Gibbs, the Court's only decision deciding the scope of an Article III "case," instead looked to whether the claims arose from a "common nucleus of operative fact." Id. at 725, 86 S.Ct. 1130.

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drafters of the Federal Rules of Civil Procedure. See Bellia, supra, at 792-98; Matasar, supra, at 1448-54.

There is scholarly commentary criticizing Gibbs and its reliance on close factual identity, however. See, e.g., Fletcher, supra, at 176-78 (arguing that Gibbs is historically, legally, and practically wrong); Matasar, supra, at 1477-90 (same). Scholars contend that this rule, though perhaps practical, has no basis in the Constitution. Matasar, supra, at 1477-90.

Courts and commentators have proposed a variety of possible standards for supplemental jurisdiction. The Seventh Circuit, relying on Gibbs, held that a counterclaim need only have a "loose factual connection" between claims to satisfy § 1367. Channell, 89 F.3d at 385. Scholars have proposed a variety of other boundaries. See, e.g., Floyd, supra, at 310-17 (urging a "necessary and proper" test for jurisdiction); Fletcher, supra, at 178-79 (proposing defining Article III based on history or on modern rules of procedure); Matasar, supra, at 1481-82 (arguing that Article III reaches any procedural rules Congress adopts). Although we need not adopt any of these approaches, we note that all are broader than the transaction-or-occurrence test.

Verizon's alter-ego counterclaim is sufficiently related to the underlying litigation to fall within Article III's jurisdiction. This litigation disputes what fees the parties owe each other and involves efforts by both parties to collect claimed fees from a discrete and common body of calls. Count three was part of Verizon's effort to collect those fees when GNAPs attempted to avoid payment. Other courts have accepted supplemental jurisdiction over claims to pierce the corporate veil and similar claims. See, e.g., Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1037 (7th Cir.2000).

This is not a situation in which there could be any due process constraints on the exercise of jurisdiction. In this case, it was sensible for the district court to try Verizon's claim to pierce the corporate veil with the rest of the litigation, rather than sending count three to state court. The case had already consumed years of litigation. The district court was familiar with, and had developed expertise on, the complicated claims at issue. It was also thoroughly familiar with GNAPs' many efforts to avoid paying access charges-useful information for a court assessing GNAPs' conduct. Finally, there was nothing unfair about trying this claim with the rest of the litigation.

C. Judgment for Verizon on Its Counterclaims Was Proper

We turn to the district court's resolution of Verizon's two counterclaims on the merits. Our

rejection of GNAPs' preemption argument removes GNAPs' only argument as to liability. What is left is a dispute over the amount of damages GNAPs and the other defendants owe Verizon.

1. Verizon's Counterclaim to Enforce the ICA

GNAPs first challenges the district court's method for calculating that GNAPs owed Verizon $57,716,714 in damages. We review the district court's application of judicial estoppel in support of that conclusion for abuse of discretion, Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 30 (1st Cir.2006), and its grant of summary judgment in Verizon's favor on the amount of damages de novo, Thore v. Howe, 466 F.3d 173, 178 (1st Cir.2006).

To calculate the amount of damages, the district court first had to decide how many minutes of traffic were subject to access charges. That calculation involved three issues: how many minutes of calls [illegible]red between 2003 and 2006, what percentage of that traffic was intrastate and subject to the DTE's order, and what percentage of traffic was local and therefore subject to reciprocal compensation rather than access charges. The court then needed to decide what rate per minute GNAPs had to pay Verizon for access charges and the interest rate.

The court found GNAPs had admitted that Verizon had sent GNAPs more than 10 billion minutes of calls for delivery to its VNXX customers.

Applying judicial estoppel, it held that 90 percent of GNAPs' traffic was intrastate.

This left the question of how many of those minutes were delivered to "local" ISPs and therefore were subject to reciprocal compensation rather than access charges. The court held that 21.78 percent of calls were to local ISPs.

That gave a total of over 7.5 billion minutes subject to access charges. The court multiplied that figure by the rate per minute. As to the rate per minute, the court held GNAPs was judicially estopped from contesting that rate was $0.00525. It added 18 percent annual prejudgment interest per Mass. Gen. Laws ch. 231, § 6C. After reducing the total owed by the amount of security for an injunction the court had already released to Verizon, the district court entered judgment for $57,716,714.

a. The Judicial Estoppel Ruling Was Not Error

The court's application of estoppel is well supported in the record. Verizon began billing GNAPs in early 2003. GNAPs made no payments for two years, so Verizon tried to terminate its service to GNAPs in March 2005, which led to the litigation discussed in GNAPs III. In June 2005, the district court granted GNAPs' motion for a temporary restraining order (TRO) in the pending litigation while GNAPs argued that the DTE's decision was preempted. After hearing evidence, the court rejected GNAPs' claim and refused to grant an injunction

pending appeal. In light of GNAPs' claim that its very existence was threatened, this court granted an injunction while we decided GNAPs III, which we lifted in April 2006. The injunction was conditioned on GNAPs posting security of $15 million in addition to the $1 million GNAPs had already posted.

In order to obtain the TRO from the district court and the injunction, pending appeal, from this court, GNAPs presented an "all-or-nothing" argument: if the DTE's order was not preempted, then GNAPs admittedly owed access charges to Verizon. GNAPs represented to both courts that those access charges were so high that GNAPs could not afford to continue providing service in Massachusetts-and could fail altogether-if it had to pay them. It argued the balance of harms to GNAPs and its customers meant Verizon should be required to continue service, despite GNAPs' failure to pay for that service.

GNAPs made this argument in its briefs and at oral argument. In its motion for the TRO, GNAPs represented to the district court that Verizon charged $0.00525 per minute and relied on that fee in its claims about irreparable injury. In fact, by April 2005, Verizon had for a year been billing GNAPs at a rate of at least $0.006114 per minute. The district court, for purposes of this case, permissibly found that it was GNAPs that had suggested the lower $0.00525 rate and "stipulated it" "[a]s a number satisfactory to it."

Further, in this court, GNAPs represented a willingness to post security in the sum of almost $18 million to satisfy any harm to Verizon, a figure consistent with the stipulated rate. Yet it now asserts

that Verizon's billing rate should be adjusted downward to $0.0008140, a rate that would have significantly weakened the irreparable harm argument GNAPs presented at the time.

GNAPs made one other critical representation. When moving the district court for an injunction pending appeal, GNAPs submitted an employee affidavit asserting that "90% of Global's revenue is derived from its ISP customers in Massachusetts." GNAPs repeatedly made other claims that similarly suggested that the overwhelming majority of its customers were in Massachusetts. Now, GNAPs tries to walk away from both of these representations, on which the courts have relied.

This court ruled that GNAPs owed access charges to Verizon in April 2006, GNAPs III, 447 F.3d at 75, and dissolved the injunction. In May 2006, in opposition to Verizon's motion to release the security GNAPs had posted, GNAPs first suggested that the Verizon billing rate was too high and argued that the proper rate was either $0.0007 or $0.002124. In 2007, however, this court affirmed the district court's order releasing that security. GNAPs IV, 489 F.3d at 24-25. We expressly rejected GNAPs' belated argument that Verizon was overcharging it and held GNAPs to its prior, higher estimate of the amount of access charges it owed. Id.

In 2008, concluding that GNAPs III clearly established that GNAPs owed access charges, the district court turned to considering damages. As trial approached, GNAPs filed a motion in limine regarding potential damages it owed. It attached an expert report concluding that Verizon was

overcharging GNAPs and that at least 75 percent of its customers were located outside Massachusetts. On December 4, 2008, the district court held a pretrial hearing to resolve several issues. After the hearing, the court held GNAPs was judicially estopped from disputing that it owed $0.00525 per minute or that 90 percent of its customers were in Massachusetts.

Judicial estoppel is an equitable doctrine that prevents litigants from taking inconsistent positions in the same or a related case. New Hampshire v. Maine, 532 U.S. 742, 744-50, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); Alternative Sys. Concepts, 374 F.3d at 32-33. Its purpose is to protect the integrity of the judicial system from litigants "playing fast and loose with the courts" to "obtain[] an unfair advantage." Patriot Cinemas, Inc. v. Gen. Cinemas Corp., 834 F.2d 208, 212 (1st Cir.1987) (internal quotation marks omitted); See also New Hampshire, 532 U.S. at 749-50, 121 S.Ct. 1808. Our review is limited to abuse of discretion.

There is no doubt that GNAPs deliberately played fast and loose with the courts in an effort to gain an unfair advantage. The district court justifiably-indeed correctly-held that GNAPs should be held to its tactical choice.

GNAPs argues that its recent positions were not really inconsistent with its prior positions. It says that it was only telling the district court that Verizon charged $0.00525 per minute, not espousing that figure. And it offers a variety of reasons why it did not really mean that 90 percent of its ISP customers were in Massachusetts. GNAPs also urges it was entitled to contest and conduct discovery on the

amount of charges it owed after losing its preemption argument.

As to the first two points, GNAPs did adopt the $0.00525 figure-and only that figure-and it did not qualify the 90 percent figure as it now attempts to do. If those figures were not accurate, GNAPs certainly misled the courts. See Cadle Co. v. Schlichtmann, Conway, Crowly & Hugo, 338 F.3d 19, 22 (1st Cir.2003) ("Our focus is on the impression [the estopped party's] statements reasonably created in the District Court.").

The final assertion does not hold because GNAPs had plenty of time and every incentive to investigate Verizon's billing rate by 2005 when it made these representations. See Alternative Sys. Concepts, 374 F.3d at 35-36 (holding that a party could not avoid judicial estoppel by failing to discover "readily available" information). It was not entitled to wait until it lost on all its other claims. One term for that strategy is "sandbagging," and the district court was right to prevent GNAPs from executing it.

b. The District Court Properly Granted Summary Judgment on the Issue of Excludable Local Minutes

GNAPs argues that the district court erred by concluding, on summary judgment, that about 21 percent of traffic between the parties was local and not subject to access charges. The district court reasoned that GNAPs had not "proffer[ed] any countervailing admissible data regarding the location

of its customers" and that this was information GNAPs could have provided.

GNAPs argues that two proffers created genuine issues of material fact. One was excluded from evidence: a late "supplemental declaration" by GNAPs' expert, which GNAPs filed one week before trial, without leave, and which presented a new theory that differed from the expert's earlier affidavit. The court also held that a Verizon employee's e-mail did not create a genuine issue of fact.

We will not overturn the court's enforcement of its timetable for expert reports. See Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir.2003); See also Levin v. Dalva Bros., Inc., 459 F.3d 68, 72 (1st Cir. 2006). GNAPs claims it had to submit this report quickly and tardily because the district court made a "sudden" bench ruling. That ruling did not discuss the percentage of local traffic; indeed the court acknowledged that issue remained open.

Without that excluded report, the court had before it GNAPs' expert's original report and Verizon's report, which agreed that 21 percent was the proper figure. No factual dispute remained.[23]

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[23] GNAPs argues the court had to rely on the data underlying its expert's supplemental report, which it says was publicly available. Because GNAPs did not include that information in the record in an admissible pleading, the court properly did not consider it. See, e.g., Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir.2000) (affirming summary judgment when the party did not submit "a valid affidavit or some other admissible evidence" in support); See also Mosher v. Nelson, 589

GNAPs next argues the district court could not infer, on summary judgment, that a Verizon employee's e-mail overestimated the number of local minutes of traffic between GNAPs and Verizon. That e-mail expressly gave data from a Verizon system called Traffic Track. Verizon submitted undisputed evidence that Traffic Track overestimated local minutes for VNXX traffic.[24]

GNAPs argues the district court applied the wrong standard for summary judgment by "assum[ing]" that this e-mail relied only on Traffic Track data. The district court was required only to draw "all reasonable inferences" in GNAPs' favor. Mosher v. Nelson, 589 F.3d 488, 492 (1st Cir.2009). The e-mail relied only on Traffic Track data and did not hint at any other basis for its calculation of local traffic. Absent evidence from GNAPs that some other source other than Traffic Track for the e-mail's figures existed, the district court properly held the e-mail did not raise a genuine factual issue.

F.3d 488, 492 (1st Cir.2009) (noting that courts on summary judgment may rely on competent evidence).

[24] According to Verizon's unrebutted evidence, Traffic Track determines locations based on phone numbers. It cannot accurately calculate traffic involving VNXX numbers, which by definition do not correspond to their owners' locations.

c. GNAPs Has Not Shown the District Court Erred in Its Damages Calculations

GNAPs raises three objections to the court's damages calculation, which we reject.

GNAPs first argues Verizon improperly failed to exclude from the calculation "transit traffic," which is traffic that did not originate from a Verizon customer. The parties agree Verizon used the number of minutes of use GNAPs supplied when GNAPs sent Verizon invoices for reciprocal compensation.[25] In discovery, GNAPs admitted its invoices correctly reported the number of minutes of traffic between Verizon's and GNAPs' customers. That admission conclusively established that Verizon's invoices did not bill GNAPs for transit traffic. See Fed.R.Civ.P. 36(b).

GNAPs next argues that the district court should have subtracted the percentage of local calls from all the minutes of use, not just from the number of intrastate minutes (90 percent of the total). GNAPs does not explain why. This argument is waived. See, e.g., Day v. Staples, 555 F.3d 42, 57 n. 14 (1st Cir. 2009).

GNAPs finally argues that there was an interest rate error: it says that the district court should have

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[25] GNAPs claims it could seek reciprocal compensation for transit traffic. The parties' ICA flatly contradicts that assertion, and so GNAPs' bills could not have included transit traffic

applied 12 percent rather than 18 percent interest. Massachusetts law imposes prejudgment interest either at the contract rate or at 12 percent per annum. Mass. Gen. Laws ch. 231, § 6C.[26] GNAPs says that Verizon agreed to 12 percent interest. But Verizon proposed using that rate if GNAPs would settle and not go to trial,[27] and GNAPs did not settle. When GNAPs did not settle, the district court properly applied the undisputed interest rate the ICA imposes, 18 percent.

2. There Was No Error in the Award to Verizon on Its Counterclaim for Alter Ego Liability and Disregard of the Corporate Form

a. The District Court Did Not Abuse Its Discretion by Granting Default Judgment as a Discovery Sanction

The district court granted default judgment on count three of Verizon's counterclaim as a sanction for willful discovery misconduct against GNAPs, the GNAPs companies, and Frank Gangi. The court ruled these defendants had violated the court's past discovery orders and the rules of discovery. To reach

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[26] The parties do not contest applying Massachusetts law.

[27] The district court agreed it was prepared "to order that and save [GNAPs] 6 percent."

this conclusion, the court made a number of factual findings that are well supported in the record.

First, the court found that Janet Lima, the GNAPs companies' bookkeeper, and Frank Gangi, their owner, lied to the court about the records GNAPs kept. Lima and Gangi insisted that the companies did not keep a general ledger or any financial documents. They recorded financial transactions in one computer accounting program, called Peachtree. Otherwise, they claimed to rely on the bank to keep records, which they could request as needed. Gangi and Lima also both repeatedly claimed ignorance of basic information about how the companies processed their finances, even though Lima kept the companies' books and wrote their checks and Gangi owned the companies and paid their taxes.[28]

The district court could easily find that Lima's and Gangi's description of the accounting practices of the GNAPs companies, Ferrous, and Gangi was "inherently incredible" and "ma[de] no sense." That conclusion was also supported by Verizon's forensic accountant, who testified that the companies' claimed

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[28] Lima, for instance, testified she did not remember writing checks bearing her name or how checks were handled at the companies. Frank Gangi claimed he knew nothing about the GNAPs companies' or his own finances and relied entirely on his accountants. Gangi testified that he did not even know where he had bank accounts. He said that if he wanted to know whether he had an account at a bank, he would call that bank.

accounting and record-retention practices were irregular.

As the district court also found, evidence suggested the defendants actually had kept general ledgers and similar records. GNAPs' chief financial officer testified that Gangi regularly gave her the company's bank statements. Gangi's accountant, Edward Taylor, testified that he prepared Gangi's and Ferrous's 2006 tax return in March 2007 using information from Peachtree, bank statements, and a general ledger.

Second, the court supportably found that the defendants had withheld and destroyed financial records. Lima testified that information in the one place the companies kept financial records-Peachtree-was lost in December 2006, when she dropped her computer down a flight of stairs. Then, on June 12, 2007, she suffered another mishap with her new computer--she deleted files using a program called Windows Washer, Lima said to avoid having family information produced during discovery.

The court could conclude that Lima's stories were "wholly incredible." Both of her alleged computer mishaps were suspiciously timed. Lima "dropped" the first computer just as the court was beginning to scrutinize the defendants' finances. And the "accidental" computer wipe occurred just minutes before GNAPs' attorneys arrived to collect discovery records, which Lima knew.

Instead, the court supportably (indeed, logically) credited testimony by a computer expert that someone intentionally wiped relevant evidence from Lima's computer hard drive and then defragmented

the drive to make recovery even more difficult. Lima admitted using a computer program, Windows Washer, to delete personal files. But the expert testified that Windows Washer was run in a "shred/wash with bleach" setting that is not a default, that must be intentionally activated, and that more thoroughly wipes the computer.

Moreover, the expert testified that only some programs were destroyed, while others such as Microsoft Office were unharmed. Most destroyed files and programs appeared to relate to financial records. Peachtree, conveniently, was destroyed, as were files named "Accounting," "Billing," "Janet," and "Peach" and shortcuts named with words like "check" and "cash." The district court could conclude that this file destruction was intentional and targeted at relevant financial records.

Third, the court supportably determined that the defendants lied to the court about when they "lost" their financial records. As the court explained, Gangi's accountant, Taylor, testified that he was able to prepare Gangi's and Ferrous's tax return in March 2007, which included the GNAPs companies' taxes. Taylor prepared those taxes months after Lima said she dropped her computer down stairs and at the same time the defendants were stonewalling efforts to discover their financial records.

On appeal, the defendants argue that the district court should have credited their insistence that they were guilty only of poor record keeping and accidents. That story was contradicted by evidence and common sense. The court certainly could conclude the better

explanation was that the defendants had willfully concealed and destroyed evidence.

Aside from their factual challenges, the defendants raise one further argument against default judgment. They urge that the district court's discovery orders were directed at GNAPs, not them. We will defer to the district court's contrary interpretation of its own orders. Cf. Lefkowitz v. Fair, 816 F.2d 17, 22 (1st Cir.1987). The court issued several such orders after the counterclaim defendants were added.[29] Those orders compelled production of evidence in the possession of all defendants, including evidence of their finances and evidence they produced in the SNET case.

In sum, significant evidence supported the district court's conclusion that GNAPs, the GNAPs companies, and Frank Gangi violated its orders and committed willful discovery misconduct. There was certainly no abuse of discretion.

b. The District Court Properly Collaterally Estopped Ferrous from Disputing Its Misconduct

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[29] GNAP's argues, without citation, that the court needed to find prejudice to Verizon and erred by so finding. Assuming, dubitante, that prejudice is a requirement, Verizon obviously suffered it from losing information about the defendants' finances while it sought to recover nearly $58 million in overdue access charges.

The district court held GNAPs' holding company, Ferrous, was collaterally estopped from challenging the SNET court's ruling that Ferrous (and other defendants in this appeal) committed willful discovery misconduct by withholding and destroying evidence. 251 F.R.D. at 96-97. The court found that the defendants lied about what financial records they kept and destroyed computer files in bad faith; removed evidence from the home of Richard Gangi, the GNAPs companies' chief financial officer, after his death; and did not cooperate fairly with discovery. Id. at 90-95.

Federal common law governs claims that a party is precluded from relitigating an issue already decided in a federal court. See Negron-Fuentes v. UPS Supply Chain Solutions, 532 F.3d 1, 7 (1st Cir. 2008). Issue preclusion requires that (1) both proceedings involved the same issue of law or fact, (2) the parties actually litigated that issue, (3) the prior court decided that issue in a final judgment, and (4) resolution of that issue was essential to judgment on the merits. GNAPs II, 427 F.3d at 44.

Ferrous argues that a default judgment is not a judgment on the merits for issue preclusion purposes and that, in any event, the issues litigated in this case were not similar to those in SNET.

Ferrous misunderstands the issues the district court in this case was precluding it from relitigating. Ferrous is correct that default judgment generally is not a judgment on the merits of the underlying claim in issue preclusion cases because a default judgment does not decide the merits of that claim. See 18A Charles Alan Wright, Arthur R. Miller & Edward H.

Cooper, Federal Practice & Procedure § 4440, at 210-13 (2d ed.2002). The Massachusetts district court was not holding Ferrous precluded from litigating the merits of the underlying claim alleging alter ego liability and disregard of the corporate form. It was holding that Ferrous was precluded from relitigating the issues which underpinned the SNET court's judgment-whether Ferrous willfully concealed and destroyed evidence. The Connecticut district court's ruling was certainly a judgment on the merits of those issues. See SNET, 251 F.R.D. at 96-97.

When the issue is framed properly, preclusion was appropriate; the Massachusetts court did not need to relitigate whether Ferrous willfully destroyed evidence. Both proceedings involved the same factual and legal issue-discovery misconduct under Rule 37(b)-and relied on much the same evidence. See Id. at 85, 90-96. Ferrous had a full and fair opportunity to dispute those allegations and lost. The district court in this case could prevent it from disputing its misconduct again.

IV.

The district court has handled this difficult and very complicated matter with admirable care.

Judgment against GNAPs for $57,716,714 on count one is affirmed. Default judgment on count three imposing joint and several liability on all appellants is

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 02-12489-RWZ, 05-10079-RWZ

GLOBAL NAPS, INC.

v.

VERIZON NEW ENGLAND INC.

v.

GLOBAL NAPS NEW HAMPSHIRE, INC.; GLOBAL NAPS NETWORKS, INC.; GLOBAL NAPS REALTY, INC.; CHESAPEAKE INVESTMENT SERVICES, INC.; 1120 HANCOCK STREET, INC.; FERROUS MINER HOLDINGS, LTD; CJ3, INC.; RJ EQUIPMENT, INC.; 321 HEATH STREET REALTY TRUST, MICHAEL COUTURE, TRUSTEE; and FRANK GANGI

January 29, 2009

JUDGMENT

ZOBEL, D.J.

This action came to evidentiary hearing and argument, as well as hearings before this court, on various motions. The issues have been heard and a

decision rendered.

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

Judgment is hereby entered on behalf of defendant and counterclaim plaintiff Verizon New England Inc. ("Verizon") against plaintiff and counterclaim defendant Global NAPS, Inc. ("GNAPs") on Count I of the Complaint in the amount of $57,716,714.

Judgment also is hereby entered on behalf of Verizon against counterclaim defendants GNAPs, Frank Gangi, Ferrous Miner Holdings, Ltd., Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., and Global NAPs Realty, Inc. (collectively, the "Defaulted Defendants") on Count III of the Complaint, thereby making said Defaulted Defendants jointly and severally liable with GNAPs to Verizon on the judgment in the amount of $57,716,714.

Counts II, IV, V, and VI of the Complaint are hereby dismissed without prejudice and without costs. Count III of the Complaint also is hereby dismissed without prejudice and without costs as against counterclaim defendants Chesapeake Investments Services, Inc., 1120 Hancock Street, Inc., CJ3, Inc., RJ Equipment, Inc., and 321 Heath Street Realty Trust.

January 29, 2009 /s/ Rya W. Zobel

DATE RYA W. ZOBEL UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 02-12489-RWZ, 05-10079-RWZ

GLOBAL NAPS, INC.

v.

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GLOBAL NAPS NEW HAMPSHIRE, INC.; GLOBAL NAPS NETWORKS, INC.; GLOBAL NAPS REALTY, INC.; CHESAPEAKE INVESTMENT SERVICES, INC.; 1120 HANCOCK STREET, INC.; FERROUS MINER HOLDINGS, LTD; CJ3, INC.; RJ EQUIPMENT, INC.; 321 HEATH STREET REALTY TRUST, MICHAEL COUTURE, TRUSTEE; and FRANK GANGI

ORDER

January 22, 2009

ZOBEL, D.J.

Counterclaim plaintiff Verizon New England Inc. ("Verizon") has moved for summary judgment on the sole remaining factual issue in this case, the number

of minutes of local intrastate VNXX traffic delivered by Verizon.[1] The motion is allowed.

The history of this case is a protracted and complicated one. A general summary of how we got to this point suffices for present purposes. The Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), requires incumbent local exchange carriers ("ILECs") to negotiate interconnection agreements with competitive local exchange carriers ("CLECs"), thereby allowing the CLECs to interconnect with their networks. See 47 U.S.C. §§ 251-52. In 2002, Verizon (an ILEC) and Global NAPs, Inc. ("GNAPs") (a CLEC) began negotiating a new interconnection agreement. GNAPs filed a petition for arbitration with the Massachusetts Department of Telecommunications and Energy ("DTE")[2] after the parties were unable to resolve, among other things, whether certain calls, designated as "virtual NXX" ("VNXX") calls, should be treated as local or interexchange calls for purposes of intercarrier compensation. The DTE issued its order in December 2002, in which it held, contrary to GNAPs' arguments, that "VNXX calls will be rated as

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[1] The motion is technically one for partial summary judgment as to Count I of Verizon's counterclaims, and the court treats it as such.

[2] The DTE no longer exists, having been split into two separate agencies (the Department of Telecommunications & Cable and the Department of Public Utilities) in April 2007. However, the court continues to refer to the agency as the DTE for simplicity.

local or toll based on the geographic end points of the call."[3] See Global NAPs, Inc. v. Verizon New England, Inc., 444 F.3d 59, 66 (1st Cir. 2006). Shortly thereafter GNAPs filed suit challenging, among other things, the DTE's authority to impose access charges on GNAPs for VNXX calls bound for an internet service provider ("ISP"). In 2005, GNAPs filed a separate suit, claiming that Verizon owed it intercarrier compensation for calls delivered to its ISP customers. Verizon filed a counterclaim in that case to recover unpaid access charges for VNXX calls it had delivered to GNAPs' customers. The parties agreed to consolidate the 2005 case with the 2002 case. After considerable skirmishing in the district and appellate court, in September 2005 this court granted Verizon's and the DTE's motions for partial summary judgment on GNAPs' challenge to the DTE

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[3] As explained in an earlier ruling, the "NXX" numbers are "the middle three digits of a ten-digit phone number" and have "generally been associated with a particular 'switch' (that is, the equipment that routes phone calls to their destination) physically located within a local calling area; NXXs have thus served as proxies for geographic location." Global NAPs, Inc. v. Verizon New England, Inc., 444 F.3d 59, 64 (1st Cir. 2006). However, GNAPs "has the ability to assign its customers 'virtual' NXXs (VNXX), so that a Global NAPs customer can be given VNXX numbers that are different than those that would normally be assigned to him based on his physical location. This allows a party to call what appears to be a 'local' number, although behind the scenes that call is actually routed to a different local calling area." Id. During the DTE proceedings GNAPs had argued, among other things, that VNXX traffic should be treated as local because VNXX calls appear to be local calls to the person dialing the call.

order. In April 2006, the Court of Appeals for the First Circuit affirmed the entry of judgment for Verizon and the DTE, albeit on different grounds, finding that the DTE had the authority to require GNAPs to pay access charges to Verizon for ISP-bound VNXX calls. See Global NAPs, 444 F.3d at 72-75.[4] The First Circuit remanded the case to this court "for any further proceedings." Id. at 76.

In September 2006, the court granted Verizon's motion for judgment on the pleadings on GNAPs' 2005 complaint, as well as its motion for prejudgment attachment and attachment by trustee process of GNAPs' funds that would be used to satisfy a judgment in its favor on its counterclaim. (See Docket # 179.) Accordingly, Verizon's counterclaims are the only remaining claims in the case.[5]

In its counterclaim Verizon seeks damages, under the DTE's order and the subsequent interconnection agreement the parties entered into pursuant to the order, for unpaid access charges and

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[4] As the First Circuit noted, "Global NAPs does not challenge the DTE's determination that whether a call is local or 'interexchange' should be based on the geographic endpoints of the call, or the decision to impose access charges on non-ISP-bound VNXX calls. Rather, the challenge is to the DTE's imposition of access charges on that subset of VNXX calls that are bound for an ISP." Id. at 72.

[5] Although the court's September 2005 order granted only partial summary judgment on GNAPs' challenge to the DTE order, GNAPs stipulated to the dismissal with prejudice of its remaining challenges to the DTE's order in order to pursue its appeal.

late payment charges that GNAPs owes for the VNXX traffic.[6] The First Circuit's opinion established Verizon's right to collect these access charges; the only question is the amount due. The amount is calculated by multiplying the number of minutes of non-local intrastate VNXX traffic by the applicable rate.[7] The court's prior legal rulings established that the applicable rate is $0.00525 per minute. The number of minutes of non-local intrastate VNXX traffic presents a more complicated question.

In its prior rulings, the court held, first, that GNAPs had admitted the total number of minutes of traffic it had received from Verizon, and second, that 90% of that traffic was intrastate. The first ruling was based upon GNAPs' admission that Verizon sent GNAPs "more than 10 billion minutes of calls" for delivery to its VNXX customers. (GNAPs Response to Verizon's Request for Admission No. 19 (Aug. 29, 2006).) GNAPs also agreed during oral argument that the number of minutes was over 10 billion. (Tr. of Oral Argument (Dec. 4, 2008) (Docket # 515), 51 ("The number of minutes is not in dispute, but the distribution of them is. . . . We have massive disputes about how to measure the distribution of the ten

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[6] Verizon has asserted other counterclaims based on theories of fraudulent conveyance and veil-piercing which are not relevant to the current motion.

[7] There is no dispute that Verizon cannot collect access charges on calls to "local ISPs," i.e., where the Verizon customer and the GNAPs ISP customer are both physically located in the same calling area.

billion minutes . . . .").) In its Rule 56.1 Statement opposing the summary judgment motion GNAPs admits that the number is precisely 10,676,949,919. (Docket # 520-3, 2.) The second ruling was based upon principles of res judicata and judicial estoppel. The court also partially allowed GNAPs' motion to compel data relevant to the determination of the amount of local intrastate VNXX traffic. (Docket # 496, 4.)

Ninety percent of the VNXX traffic was intrastate; this amounts to 9,609,254,927 minutes. The remaining variable to be determined is how many of these minutes were delivered to "local ISPs," as defined supra in footnote 7. Verizon asserts that the amount is at the most 21.78% of the intrastate traffic, depending on whether the calculations by GNAPs' expert (20.48%) or its own expert (21.78%) are used, and in the interest of expediency it is willing to accept the 21.78% number. It argues that GNAPs has no admissible evidence to prove otherwise. GNAPs begs to differ and purports to submit a revised "Declaration" by its expert, Dr. Selwyn. (Docket # 520-4.)

Summary judgment is appropriate where there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "For a dispute to be 'genuine,' there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in the non movant's favor. The evidence cannot be merely colorable, but must be sufficiently probative to show differing versions of fact which justify a trial." Casas Office Machs., Inc. v. Mita Copystar Am., 42 F.3d 668, 686

(1st Cir. 1994) (internal citations omitted). "A summary judgment issue is not trialworthy unless there is enough evidence for a jury to return a verdict for the nonmoving party." Catrone v. Thoroughbred Racing Ass'ns of North Am., Inc., 929 F.2d 881, 884-85 (1st Cir. 1991) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)). I read the record in the light most favorable to the non-moving party (here, GNAPs) and draw all reasonable inferences in its favor. "In that regard an inference is reasonable only if it can be drawn from the evidence without resort to speculation." Merchants Ins. Co. of New Hampshire, Inc. v. U.S. Fid. and Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998) (internal quotation marks and citation omitted).

The Interconnection Agreement between the parties specifically called for GNAPs to provide information about its customers' locations to Verizon. (Agreement ¶ 6.5.) By its own admission, GNAPs did not provide this information.[8] Much of the complexity

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[8] See Counterclaim Defendants' Rule 56.1 Statement Opposing Verizon New England Inc.'s Motion for Summary Judgment ¶ 12:

[Statement]: Prior to November 30, 2008, GNAPs had not produced any documents that purported to identify the location of GNAPs' ISP customers in Massachusetts.

RESPONSE: Admitted, except that documents identifying ISP customers and telephone numbers were produced and Verizon had available to it information concerning the locations of those customers.

(Docket # 520-3 (emphases added).)

in this case stems from that simple fact. GNAPs has variously asserted either that Verizon nonetheless could derive this information on its own, or that relevant customer information was lost when Verizon terminated service in 2006. (See, e.g., Pl. Global NAPs, Inc.'s Mem. of Law in Opp. to Def.'s Mot. to Compel (Docket # 226), 10.) Both of these arguments fail. The DTE order makes clear that Verizon could not figure out the customer location data on its own.[9] See also Declaration of John Andrade (Docket # 500, Ex. F) ("Neither [Traffic Track] nor [the Trunk Inventory Records System] nor any other Verizon data source of which I am aware, however, contains information on the actual location of GNAPs' customers . . . . Such information is necessary to determine . . . whether a particular call by a Verizon

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[9] See DTE Order, Dec. 12, 2002, available at 2002 Mass. PUC LEXIS 65, at 53, 55 (noting that there was "no technically feasible manner of determining the geographic end points of a call" but approving Verizon's suggestion that the parties "work collaboratively to determine the geographic end points of a call"). Indeed, the DTE was responding to GNAPs' argument that charges should not be imposed for VNXX calls because "there is no readily available information that tells a carrier the physical location of a called or calling party," and other regulatory agencies had declined to allow Verizon to impose charges due to this "lack of information." Id. at 45, 55. In directing the parties to work collaboratively, the DTE reiterated that "[i]f GNAPs cannot ensure that all LECs, including Verizon, have access to the geographic end point data necessary to properly rate a call as local or toll, and are properly compensated, then GNAPs cannot provide virtual NXX service to its customers." Id. at 55.

customer was delivered to a GNAPs customer physically located in the same local calling area as the Verizon customer . . . ."). With regard to the issue of information being lost when service was terminated, Verizon did not terminate service until 2006, well into this litigation and long after the Federal Rules relating to preservation of evidence began to apply.

Under these circumstances, given GNAPs' prior admissions about the locations of its customers in Quincy, Massachusetts, which the court has previously discussed (See Order (Docket # 496), 2-3), it is eminently reasonable for Verizon to base its calculations on the assumption that all of GNAPs' in-state ISP customers were located in Quincy, Massachusetts. Indeed, GNAPs' expert assumed the same thing. With that assumption, Verizon can then determine the percentage of local calls simply by identifying the percentage of its customers which are located in the same local calling area as GNAPs' switch in Quincy, Massachusetts. Verizon's calculation of this amount is expressed in Mr. Andrade's Declaration (Docket # 500, Ex. F at ¶ 18), which is admissible.

Although Verizon ultimately bears the burden of establishing the amount it is owed, it would be anomalous for GNAPs to benefit from its failure to provide the data necessary to this calculation. In any event, GNAPs does not proffer any countervailing admissible data regarding the location of its customers. Dr. Selwyn's recent "Declaration," which calculates an entirely new percentage of local traffic based on an entirely new theory of which calls should

be considered "local," is not only untimely under Rule 26, but filed without leave of the court. The Declaration is inadmissible. See Fed. R. Civ. P. 26(a)(2)(C). GNAPs argues that the utility of Dr. Selwyn's previous expert report is limited given its reliance upon assumptions that are not applicable, e.g., that between 75% and 95% of the traffic is interstate. In any event, Dr. Selwyn's initial calculation of the percentage of local traffic is less than Verizon's calculation, and as a result Verizon's calculation is more favorable to GNAPs.

GNAPs also proffers evidence from Verizon's Traffic Track system which, it suggests, shows that a high percentage of the traffic was local. However, it is clear from the deposition of Ms. Dion, Manager of Verizon's Network Information Support Department and a manager in the Traffic Track Group, that the Traffic Track system designates a call as local based solely on a comparison of the originating telephone number and the dialed telephone number. (Docket # 506, Ex. A.) As the First Circuit noted, the whole point of the VNXX numbers is to make non-local calls appear local. See Global NAPs, 444 F.3d at 64. The fact that the superficial comparison between an originating VNXX number and a dialed number indicates that the call is local is neither surprising nor probative of whether the call is in fact local; no reasonable jury could infer that almost all of the VNXX traffic is local simply because it appears to be so. This is precisely the sort of "rank speculation" that cannot be relied upon. See Velazquez-Fernandez v. NCE Foods, Inc., 476 F.3d 6, 10 (1st Cir. 2007).

Verizon has proffered admissible evidence that 21.78% of the traffic is local, and GNAPs does not proffer any admissible evidence in contradiction that might create a genuine issue for trial. Accordingly, Verizon's motion for summary judgment on the issue of the amount of local traffic is allowed. As stated above, 90% of the VNXX traffic was intrastate; this amounts to 9,609,254,927 minutes. The 21.78% of local traffic must be applied to the number of intrastate minutes, as by definition local traffic is a subset of intrastate traffic. This means that 78.22% of the traffic – 7,516,359,204 minutes – is non-local intrastate traffic for which Verizon can collect access charges at a rate of $0.00525 per minute.

It is undisputed that GNAPs has thus far paid $16,000,000 to Verizon for VNXX access charges in the form of a bond which was posted as security for one of its prior appeals and subsequently released to Verizon in May 2006. The court accepts Verizon's application of this amount to GNAPs' outstanding balance, as detailed in its filing with the court (Docket # 511). GNAPs' objections to this calculation are overruled, with the exception of its objection to the use of the 20.48% number for local traffic instead of 21.78%; that objection is sustained.

Accordingly, Verizon's motion for summary judgment as to Count I (Docket # 499) is ALLOWED. Verizon is entitled as a matter of law to judgment in the amount of $57,716,714. The Judgment shall also reflect Verizon's dismissal of Counterclaims II, IV, V and VI. Verizon shall file a proposed form of judgment with the court.

As the motion for summary judgment is allowed, GNAPs' motion to permit Dr. Selwyn to testify on specified dates (Docket # 521) is DENIED.

Verizon's recently-filed motion for entry of judgment under Rule 54(b) (Docket # 533) is DENIED.

January 22, 2009 /s/ Rya W. Zobel
DATE RYA W. ZOBEL UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 02-12489-RWZ, 05-10079-RWZ

GLOBAL NAPS, INC.

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ORDER

December 8, 2008

ZOBEL, D.J.

Several pending motions are before the court.

Global NAPs, Inc. ("GNAPs") has moved for reconsideration of the court's December 4, 2008, order. (Docket # 490.) To the extent any confusion

exists, the court clarifies that it issued no ruling regarding the application of access charges for VNXX interstate traffic. Rather, it concluded under principles of res judicata and judicial estoppel that 90% of GNAPs' VNXX traffic during the relevant period was intrastate, and under those circumstances accepted Verizon's offer to forgo litigation of the interstate traffic issue and thereby its claim to compensation for the remaining 10% of traffic.[1] In reaching this conclusion, the court did not consider solely Mr. Masuret's representation that at least 90% of GNAPs' revenue is derived from ISP customers located in Massachusetts. Among other things, the court considered the following representations made by GNAPs when it successfully moved for a temporary restraining order: (1) Verizon delivers all of GNAPs' traffic to GNAPs' facilities in either Quincy or Springfield (Docket # 56, 7); (2) GNAPs offered its ISP customers the ability to place their equipment in GNAPs' Quincy facility and "the vast majority" chose to do so (Id. at 5; Shaw Aff. (Docket # 57) ¶ 3); (3) under the DTE Order "the end-point of an ISP-bound call would be the physical location of the ISP" and not "the user interacting with the desired web page" (Docket # 56, 7)[2]; and (4) "[c]onsequently,

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[1] Under similar circumstances it accepted an applicable rate of $0.00525/MOU even though Verizon has consistently argued for application of a higher rate.

[2] Indeed, GNAPs argued that the DTE Order was contrary to the ISP Remand Order for precisely this reason. (Id. at 7 n.9; Id. at 10.).

Global would have to pay Verizon access charges on a call to a Global ISP that routes its traffic through Global's Quincy facility, if that call originates outside of Verizon's Quincy local calling area or its adjoining local calling areas." (Id.) GNAPs went on to argue that if it were subject to the DTE's Order it would have to pass these access charges on to its customers, "resulting in an increase of cost from approximately $500.00 per month to more than $3,000.00 per month" for services, and thereby would be forced out of business in Massachusetts due to its inability to compete for the provision of dial-up Internet service. (Id. at 7-8.) It stated that if it went out of business it would be "costly and disruptive" for its customers to find new service because "[e]ach ISP would have to relocate since Global could not permit non-customer ISPs to use its Quincy facility." (Id. at 8.) It is simply not possible to reconcile these representations with GNAPs' current position that under the DTE Order a sizable portion of the VNXX traffic is interstate and not subject to access charges. The motion for reconsideration is denied.

The court also held on December 4, 2008, that Verizon is not entitled to charge for local intrastate VNXX traffic. The question to be determined is what amount, out of the 90% of VNXX traffic which is intrastate, is local traffic. Trial will go forward on January 5, 2009, on this sole question. The court makes several observations about the upcoming trial.

Verizon as the counterclaim plaintiff bears the burden of showing how much compensation is due to it under the agreement.

Although portions of the expert reports of Messrs. Selwyn and Andrade may be relevant, neither is currently in evidence. While certain statements in the reports regarding the calculation of local traffic may qualify as party admissions, none qualify for the application of estoppel.

The court's December 3, 2008, order precluded only GNAPs from using or otherwise relying upon the documents that it did not timely produce; this limitation does not apply to Verizon.[3]

Evidence relating to the amount of interstate traffic is not relevant to the question of what portion of the intrastate traffic is local.

GNAPs' motion to compel (Docket # 438) is allowed as to requests 1-2 and 5-7 only to the extent that the requests call for data relevant to the determination of the amount of local intrastate VNXX traffic delivered by Verizon to GNAPs (and to the extent that such material has not previously been produced in response to other requests). Verizon shall produce documents responsive to these requests to GNAPs in an expeditious manner.

Application of pre-judgment interest is a question for the court. I am persuaded that the applicable interest rate under Mass. Gen. Laws ch. 231, § 6C, is 18%, as that is what the agreement between Verizon and GNAPs provides. However, Verizon shall file

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[3] The court does not suggest that Verizon should use this data, merely that it is not precluded from doing so.

with the court by December 22, 2008, an explanation of how it applied the $16 million security to GNAPs' outstanding balance and its reasons therefor. GNAPs shall file a response, should it wish to do so, by January 5, 2009. Both briefs are limited to five pages.

The court would view favorably a motion by Verizon under Fed. R. Civ. P. 41 (a)(2) to dismiss all of the remaining counterclaim defendants from this action without prejudice.

In summary, GNAPs' motion for reconsideration (Docket # 490) is DENIED. Its motion to compel (Docket # 438) is ALLOWED within the confines discussed above. The court will rule on Verizon's motion for a restraining order (Docket # 491) when it receives a proposed order from the parties, as discussed during the conference on December 5, 2008.

December 8, 2008 /s/Rya W. Zobel
DATE RYA W. ZOBEL UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 02-12489-RWZ, 05-10079-RWZ

GLOBAL NAPS, INC.

v.

VERIZON NEW ENGLAND INC.

v.

GLOBAL NAPS NEW HAMPSHIRE, INC.; GLOBAL NAPS NETWORKS, INC.; GLOBAL NAPS REALTY, INC.; CHESAPEAKE INVESTMENT SERVICES, INC.; 1120 HANCOCK STREET, INC.; FERROUS MINER HOLDINGS, LTD; CJ3, INC.; RJ EQUIPMENT, INC.; 321 HEATH STREET REALTY TRUST, MICHAEL COUTURE, TRUSTEE; and FRANK GANGI

ORDER

January 7, 2008

ZOBEL, D.J.

Kelley Drye & Warren LLP ("Kelley"), counsel for plaintiff and counterclaim defendant Global NAPs, Inc. and several other counterclaim defendants, has moved to withdraw (Docket # 339). The motion is allowed effective on the appearance of successor counsel which shall be filed no later than February 1,

2008. Kelley shall turn over to these parties or their new counsel all files necessary to conduct the pending litigation from this point forward.

The several motions to seal papers related to the motion to withdraw (Docket ## 329 and 340) and to file additional papers under seal (Docket ## 336 and 344) are allowed.

Plaintiff and counterclaim defendants have moved to dismiss the First Amended Counterclaims for lack of subject matter jurisdiction on the ground that the Telecommunications Act of 1996, 47 U.S.C. §§ 151 et seq. ("Act"), does not provide for federal jurisdiction of claims to enforce the terms of the interconnection agreement ("ICA") entered into between the parties because defendant and counterclaim plaintiff Verizon New England Inc. ("Verizon") did not first present its claims to the Massachusetts Department of Telecommunications and Energy ("DTE"), the state utility commission which initially approved the ICA.[1] (Docket # 308.) The motion is denied. This court has jurisdiction over a contractual claim that on its face implicates one of the Act's duties, to pay for traffic exchanged, which is

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[1] The First Amended Counterclaims allege breach of the ICA, fraudulent transfer of assets, and alter ego liability. Federal jurisdiction is premised upon 28 U.S.C. § 1331 and § 1367. The court previously found that supplemental jurisdiction exists for the state law claims of fraudulent transfer and alter ego liability based upon their relation to the breach of contract claim. (See May 23, 2007 Order (Docket # 298).) Familiarity with the other facts and procedural history of this litigation is presumed.

clearly a federal question. See Verizon Maryland, Inc. v. Global NAPs, Inc., 377 F.3d 355, 363-64, 368-69 (4th Cir. 2004). I am not persuaded that 47 U.S.C. § 252(e)(6) divests the court of its jurisdiction.[2] See Starpower Commc'ns, LLC, 15 F.C.C.R. 11277, 11279, 11280 n.14 (2000) (suggesting in dicta that although interpretation and enforcement of ICAs is within the states' "responsibility" under § 252, federal courts may exercise concurrent jurisdiction); Verizon New York Inc., et al. v. Global NAPs, Inc., et al., Civ. No. 03- 05073 (E.D.N.Y. Sept. 20, 2007) (finding federal jurisdiction in similar circumstances and collecting cases where federal courts have found jurisdiction under § 1331 to interpret ICAs in the first instance); but See Core Commc'ns, Inc. v. Verizon Pennsylvania, Inc., 493 F.3d 333 (3d Cir. 2007) (finding that state commissions have exclusive jurisdiction over actions to interpret and enforce ICAs in the first instance). In any event, even if interpretation of the ICA by the DTE was required prior to assertion of the claim in federal court, Verizon's right to collect access charges for the VNXX calls has already been considered and determined by

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[2] Section 252(e)(6) provides in relevant part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

the DTE. The parties entered into the current ICA pursuant to an arbitration order by the DTE which was subsequently affirmed by the First Circuit and which spawned this litigation in the first place. See generally Global NAPs, Inc. v. Verizon New Eng., Inc., 396 F.3d 16 (1st Cir. 2005); Global NAPs, Inc. v. Verizon New Eng., Inc., 444 F.3d 59 (1st Cir. 2006); Global NAPs, Inc v. Verizon New Eng., Inc., 489 F.3d 13 (1st Cir. 2007).

The several motions to stay discovery or for protective orders pending decision on the motion to dismiss (Docket ## 295, 312 and 315) are denied as moot. However, Verizon shall abstain from insisting on discovery responses until February 1, 2008 or the earlier filing of the appearance by new counsel for plaintiff and counterclaim defendants.

Verizon moved for leave to file Second Amended Counterclaims adding additional reach and apply defendants, and in the same motion requested a temporary restraining order and preliminary injunction against plaintiff and current and proposed counterclaim defendants to enjoin them from alienating, transferring, encumbering or otherwise diminishing four assets (two properties and two planes) allegedly funded in whole or in part by plaintiff. (Docket # 299.) The motion to amend the counterclaims is allowed. Plaintiff and counterclaim defendants' motion for leave to file an amended reply to the First Amended Counterclaims (Docket # 345) was allowed at the hearing on January 3, 2008.

The court issued a temporary restraining order on May 24, 2007 (Docket # 301). On the parties' agreement, the temporary restraining order has

remained in effect since then, effectively converting it into a preliminary injunction. Moreover, defendant has adequately satisfied the requirements for a preliminary injunction. The motion for preliminary injunction is therefore allowed.

January 7, 2008 /s/ Rya W. Zobel

DATE RYA W. ZOBEL UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2657

GLOBAL NAPS, INC.,
Plaintiff, Appellant,
v.
VERIZON NEW ENGLAND INC. d/b/a Verizon Massachusetts; MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY; PAUL B. VASINGTON, in his capacity as Commissioner; JAMES CONNELLY, in his capacity as Commissioner; W. ROBERT KEATING, in his capacity as Commissioner; DEIRDRE K. MANNING, in her capacity as Commissioner; and EUGENE J. SULLIVAN, JR., in his capacity as Commissioner.,
Defendants, Appellees,

DECIDED: April 11, 2006

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETS
[Hon. Rya W. Zobel, U.S. District Judge]

Before LYNCH, Circuit Judge, CAMPBELL, Senior Circuit Judge and HOWARD Circuit Judge.

LYNCH, Circuit Judge.

The Massachusetts Department of Telecommunications and Energy (DTE), acting as an arbitrator of a dispute over an interconnection agreement between Verizon New England, Inc. and Global NAPs, Inc., issued an order requiring Global NAPs to pay Verizon compensation for certain phone calls; the amount Verizon alleges Global NAPs owes is at least $42 million. The question before the DTE involved a particular variant on a larger question of allocation of compensation for telephone calls placed to internet service providers (ISPs). The larger question has been addressed in a series of orders from the Federal Communications Commission (FCC). At the heart of this case is one such order, the ISP Remand Order.

The DTE, in an arbitration order, required Global NAPs to pay Verizon access charges for all "virtual NXX" traffic, including non-local ISP-bound traffic, rejecting Global NAPs' argument that state commissions were preempted by the ISP Remand Order from regulating intercarrier compensation for all ISP-bound traffic. Global NAPs filed suit challenging the DTE's conclusion in federal district court. Verizon and the DTE argued that the DTE retained authority to decide the issue because the FCC order only preempted state commission regulation of "local" traffic sent to an ISP, and the FCC did not hold that virtual NXX traffic is such local traffic.

The district court never reached the preemption issue, because it found that Global NAPs had implicitly consented to the "jurisdiction" of the DTE to resolve the dispute, and so could not later challenge the DTE's jurisdiction to impose access charges for ISP-bound traffic. It granted Verizon and the DTE's motions for partial summary judgment. No party on appeal agrees with that reasoning.

In the end, we affirm, though on different grounds. A party contesting an issue of whether federal law has preempted a state commission's authority does not waive judicial review of the argument by first presenting it to the commission in the course of an arbitration under the Telecommunications Act of 1996. Because the preemption question was not waived, it must be addressed. The issue is one of federal law over which the federal court exercises de novo, not deferential, review. We reach the merits and hold that the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls as are involved here, leaving the DTE free to impose access charges for such calls under state law.

I.

Regulatory Background

Prior history between these parties is set forth in our opinions in Global Naps, Inc. v. Verizon New England, Inc. (Global Naps I), 396 F.3d 16 (1st Cir.2005), and Global Naps, Inc. v. Massachusetts

Department of Telecommunications & Energy (Global Naps II), 427 F.3d 34 (1st Cir.2005).

The Telecommunications Act of 1996 (TCA), Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), was enacted "to end the local telephone monopolies and create a national telecommunications policy that strongly favored competition in local telephone markets." Global Naps I, 396 F.3d at 18; P.R. Tel. Co. v. Telecomms. Regulatory Bd., 189 F.3d 1, 7 (1st Cir.1999); See also Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 638, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002); AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). To achieve this goal, the TCA requires the former local phone monopolies, called incumbent local exchange carriers (ILECs), to allow competitive local exchange carriers (CLECs) to interconnect with their networks. See 47 U.S.C. § 251(c)(2). Interconnection permits customers of one local exchange carrier to make calls to, and receive calls from, customers of other local exchange carriers. Global Naps II, 427 F.3d at 36. The TCA also requires the ILECs to negotiate in good faith the terms of interconnection agreements with the CLECs. See 47 U.S.C. § 251(c)(1). "These agreements provide the terms of interconnection and 'fulfill the duties' enumerated in § 251." Global Naps II, 427 F.3d at 37 (quoting 47 U.S.C. § 251(c)(1)).

Section 252 prescribes the process by which inter-connection agreements are to be formed. 47 U.S.C. § 252. Under this provision, if negotiations between local exchange carriers do not result in a

final agreement, either party can petition the relevant state commission to arbitrate unresolved issues. See Id. § 252(b)(1). The state commission must limit its consideration of the agreement to the matters specifically presented in the petition for arbitration and in the response. See id. § 252(b)(4)(A). The state commission has "the authority to decide the open issues between the parties, and to impose conditions on the parties for the implementation of the terms of arbitration into an agreement," Global Naps I, 396 F.3d at 19 (citing 47 U.S.C. § 252(b)(4)(C)), so long as its resolutions are consistent with § 251 and any regulations promulgated by the FCC, See 47 U.S.C. §§ 252(c)(1), 253(a). Once an agreement is concluded, it is submitted to the state commission for final approval. Id. § 252(e).

State commission decisions are subject to judicial review in federal court under 47 U.S.C. § 252(e)(6):

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

A. Reciprocal Compensation and Access Charges

The underlying issue on appeal is whether, as Global NAPs argues, the FCC's ISP Remand Order preempted state commissions from regulating intercarrier compensation for all ISP-bound calls. Verizon and the DTE take the position that the FCC only expressly preempted state regulation of intercarrier compensation for "local" ISP-bound calls. This issue requires a brief discussion of the distinction between local and "interexchange" calling and the different mechanisms of intercarrier compensation that apply to them.

The FCC and the DTE have maintained a distinction between "local" and "interexchange" traffic. See Local Competition Provisions in the Telecommunications Act of 1996 (Local Competition Order) ¶¶ 1033-35, 11 F.C.C.R. 15499, 16012-14, 1996 WL 452885 (1996) (drawing the distinction). Local traffic stays within the boundaries of a local calling area. Interexchange (or "non-local") traffic crosses the boundaries of a local calling area and is generally subject to toll or long-distance charges paid by the calling party.[1] Traditionally, local calling areas have been geographically defined.

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[1] Interexchange traffic consists of so-called "local toll" calls, which cross the boundaries of local calling areas but remain within a local access and transport area (LATA), and "long distance" calls, which cross the boundaries of LATAs. See SBC Commc'ns Inc. v. FCC, 407 F.3d 1223, 1227 (D.C.Cir.2005) ("IntraLATA service is what consumers generally know as local service; intraLATA 'toll' calls, however, encompass those long-distance calls that do not travel beyond the borders of a single LATA."); SBC Commc'ns, Inc. v. FCC, 154 F.3d 226, 231 n. 3

Intercarrier compensation comes into play whenever two or more carriers collaborate to complete a phone call. Whether a call is "local" or "interexchange" generally makes a difference in what regime of intercarrier compensation-reciprocal compensation or access charges-applies to that call.

The TCA requires interconnecting local exchange carriers (LECs) to establish "reciprocal compensation arrangements," 47 U.S.C. § 251(b)(5), under which the originating LEC compensates the terminating LEC for the transport and termination of telecommunications traffic. See Global Naps II, 427 F.3d at 36 (citing 47 C.F.R. § 51.701). The FCC, in its initial regulations implementing the TCA, limited reciprocal compensation obligations "to [telecommunications] traffic that originates and terminates within a local area," leaving interexchange calls outside the reciprocal compensation regime. See Local Competition Order, ¶ 1034, 11 F.C.C.R at 16013, 1996 WL 452885; See also Global Naps II, 427 F.3d at 36-37.

In those regulations, the FCC made clear that it was leaving in place the pre-existing access charge regime that applied to interexchange calls:

> [A]s a legal matter, ... transport and termination of local traffic are different

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(5th Cir.1998); Mich. Bell Tel. Co. v. Chappelle, 222 F.Supp.2d 905, 909 n. 6 (E.D.Mich.2002).

> services than access ser-vice for long distance telecommunications.... The [TCA] preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

Local Competition Order, ¶ 1033, 11 F.C.C.R. at 16012-13, 1996 WL 452885; See also Id. ¶ 1035, 11 F.C.C.R. at 16013, 1996 WL 452885 ("Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges.").

Importantly, the FCC's initial TCA regulations also reaffirmed the ability of states to regulate intrastate access charges. As a result, Verizon's intrastate access charge tariffs for all phone calls are approved by the DTE.

In its initial TCA regulations, the FCC also left with the state commissions the power to define local calling areas "consistent with [their] historical practice of defining local service areas for wireline LECs," and decided that the states should "determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different." Id. ¶ 1035, 11 F.C.C.R. at 16013, 1996 WL 452885.

B. Global NAPs' VNXX System

Under the traditional system for rating calls, whether a call is "local" or "interexchange" depends on geographically defined local calling areas. The DTE established the existing geographic local calling area structure for Massachusetts after a generic proceeding "in which all interested Parties had the opportunity to comment." Verizon implements this system by comparing the "NXX" numbers (the "NXX" is the middle three digits of a ten-digit phone number) of the caller and the recipient. The "NXX" has generally been associated with a particular "switch" (that is, the equipment that routes phone calls to their destination) physically located within a local calling area; NXXs have thus served as proxies for geographic location. This means that if the NXX numbers of the caller and the recipient were within the same local calling area, one could assume that the caller and recipient were actually physically within the same calling area and bill the call as a local call.

Global NAPs has the ability to assign its customers "virtual" NXXs (VNXX), so that a Global NAPs customer can be given VNXX numbers that are different than those that would normally be assigned to him based on his physical location. This allows a party to call what appears to be a "local" number, although behind the scenes that call is actually routed to a different local calling area. When the party making such a call is a Verizon customer, the call is transmitted outside the local calling area by Verizon.

Many of Global NAPs' ISP customers use VNXX arrangements, and many of these ISPs' end-user customers use Verizon for local phone service. To access the Internet, the end-user dials in to a VNXX number assigned to his or her own local calling area. Then, Verizon transports the call across local calling areas to Global NAPs' point of interconnection with the Verizon network. Global NAPs and Verizon agree that "[u]nder VNXX arrangements, the Verizon end user's call to the ISP's server is toll-free [to the end user] whether or not the ISP's server is located in the same local exchange area in which the end-user originates the call." (emphasis added).

C. The ISP Traffic Debate

The treatment of intercarrier compensation for ISP-bound traffic has been a matter of considerable debate in recent years. Calls to ISPs tend to be long, and generally go exclusively from the ISP customer to the ISP. This has created opportunities for regulatory arbitrage. For example, in the context of reciprocal compensation, since reciprocal compensation flows from the LEC whose customer makes the phone call to the LEC whose customer receives the phone call, an LEC with a high proportion of ISP customers-as Global NAPs has-stands to gain a windfall in a reciprocal compensation scheme which includes traffic to an ISP. See Global Naps II, 427 F.3d at 37

(citing Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1, 2-3 (D.C.Cir.2000)).[2]

The FCC has issued several orders related to intercarrier compensation for ISP-bound traffic. In 1999, the FCC ruled that ISP-bound traffic was not subject to reciprocal compensation obligations under 47 U.S.C. § 251, although it left to state commissions the ability to conclude "pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim ... rule" pending final FCC rulemaking on the matter. Local Competition Provisions in the Telecomms. Act of 1996 ("Internet Traffic Order") ¶¶ 26, 27, 14 F.C.C.R. 3689, 3705-06, 1999 WL 98037 (1999).

The D.C. Circuit vacated the Internet Traffic Order on March 24, 2000 and remanded to the FCC, "finding that the FCC's rationale for treating ISP-bound traffic as interstate traffic for the purposes of reciprocal compensation was inadequate." Global Naps II, 427 F.3d at 39 (citing Bell Atl. Tel. Cos., 206 F.3d at 9). On April 27, 2001, the FCC issued an order in response to the D.C. Circuit's remand, holding once again that the "provisions of section

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[2] Global Naps II involved the question of whether the interpretation of a provision of an interconnection agreement by one state commission precluded a different interpretation by another state commission of an identically worded provision. 427 F.3d at 48-49. That case involved a different interconnection agreement than that at issue here. See Id. at 36 n. 1.

251(b)(5) do not extend to ISP-bound traffic" but resting its decision on a different legal ground. Local Competition Provisions In The Telecomms. Act Of 1996 (ISP Remand Order) ¶ 1-2, 16 F.C.C.R. 9151, 9153, 2001 WL 455869 (2001). The FCC also provided an interim intercarrier compensation regime for at least some ISP-bound traffic to supplant existing state regimes going forward. This interim regime was meant to limit opportunities for regulatory arbitrage. It is undisputed that this interim regime preempts state commission regulation of intercarrier compensation for local ISP-bound calls. The question here is whether the preemptive effect extends to the interexchange ISP-bound calls at issue here.

The D.C. Circuit held that the FCC's new legal grounds as expressed in the ISP Remand Order were still inadequate. See WorldCom, Inc. v. FCC, 288 F.3d 429, 433-34 (D.C.Cir.2002). However, it chose not to vacate the FCC order, and so the ISP Remand Order remains in force. See Global Naps II, 427 F.3d at 40 (citing WorldCom, Inc., 288 F.3d at 434; Verizon Md. Inc. v. Global NAPs, Inc., 377 F.3d 355, 367 (4th Cir.2004)).

Simultaneously to the release of the ISP Remand Order, the FCC issued a notice of proposed rulemaking to consider whether it should reconsider the system of intercarrier compensation for all calls, including calls to ISPs. See Developing a Unified Intercarrier Compensation Regime (Intercarrier Compensation NPRM), 16 F.C.C.R. 9610, 2001 WL 455872 (2001); See also Developing A Unified Intercarrier Compensation Regime (Intercarrier Compensation FNPRM), 20 F.C.C.R. 4685, 2005 WL

495087 (2005) (further notice of proposed rulemaking).

II.

Procedural History

Verizon and Global NAPs began the negotiation process for a new interconnection agreement in 2002. Global Naps I, 396 F.3d at 19-20. On July 30, 2002, Global NAPs filed a petition for arbitration with the DTE for resolution of a number of open disputes concerning the proposed interconnection agreement, Id. at 20, including whether VNXX calls should be treated as local or interexchange for purposes of intercarrier compensation. Included with this petition was a marked-up version of the interconnection agreement, reflecting Global NAPs' proposed changes. Verizon filed its response to Global NAPs' petition on August 22, 2002, including its own marked-up version of the interconnection agreement. The parties filed direct testimony with the DTE on September 10, 2002. An evidentiary hearing was held on October 9, 2002, and the parties submitted briefs on October 21, 28, and 30, 2002.

With respect to the VNXX issue, Global NAPs argued that allowing Verizon to impose access charges on such calls would thwart technological advances. Indeed, Global NAPs argued that VNXX traffic should be treated as local traffic, and therefore be subject to the state reciprocal compensation regime or, to the extent the traffic was ISP-bound,

the federal interim compensation regime. As detailed below, during the course of the administrative proceedings Global NAPs also made clear its position that the ISP Remand Order had preempted the DTE's authority to regulate intercarrier compensation for all ISP-bound traffic, while leaving in place the DTE's ability to regulate intercarrier compensation for other intrastate calls.

Verizon argued that the entire VNXX system was simply a way for Global NAPs to engage in regulatory arbitrage. In effect, Verizon argued, Global NAPs' VNXX system was a way to provide toll-free services to Verizon customers (so that Verizon would not get any fees from those customers), deprive Verizon of the access fees it would normally get for toll-free calls, and instead require Verizon to pay Global NAPs reciprocal compensation.

The DTE issued an order on December 12, 2002, resolving all open issues. With respect to the VNXX issue, the DTE rejected Global NAPs' position that all VNXX calls be treated as local for intercarrier compensation purposes. It found Global NAPs' position would create "considerable market distortion based on an implicit Verizon subsidy of [Global NAPs'] operations." Instead, the DTE decided that "VNXX calls will be rated as local or toll based on the geographic end points of the call." It further found that Verizon's proposal to have the parties collaborate to determine the geographic end points of VNXX calls was "an acceptable starting point," and ordered the parties to submit contract language with the final agreement to implement Verizon's solution.

The DTE also rejected Global NAPs' arguments based on the ISP Remand Order, finding that the order "explicitly recognized that intrastate access regimes in place prior to the Act remain unchanged until further state commission action" and "continues to recognize that calls that travel to points beyond the local exchange are access calls." The DTE expressed its intent to continue enforcement of the existing intrastate access charge regime.

The DTE ordered the parties to incorporate the arbitrated terms into a final interconnection agreement by January 2, 2003; this deadline was later extended to January 17, 2003 on the parties' joint motion. Global Naps I, 396 F.3d at 20. After the DTE issued its December 12 order, the parties began negotiating final terms of interconnection. However, on January 9, 2003, Global Naps informed Verizon that it refused to negotiate any further. Instead, it attempted to adopt the terms of a different agreement between Verizon and Sprint.[3] Id.

Verizon responded on January 17, 2003 by filing a motion for approval of a final arbitrated agreement, attaching a proposed final agreement. Id. This agreement contained the following provision, § 7.3.8, to deal with the VNXX compensation issue: "[Global NAPs] shall pay Verizon's originating access charges

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[3] "[T]he TCA requires ILECs to allow any requesting CLEC to adopt the terms and conditions of any interconnection agreement it has with any other CLEC, provided that agreement has been approved by the requisite state telecommunications commission." Global Naps I, 396 F.3d at 19 (citing 47 U.S.C. § 252(i)).

for all [VNXX] Traffic originated by a Verizon Customer, and [Global NAPs] shall pay Verizon's terminating access charges for all [VNXX] traffic originated by a [Global NAPs] customer." It is this provision of the agreement that Global NAPs challenges, to the extent that it requires payment of access charges for ISP-bound traffic.

In a February 19, 2003 order, the DTE rebuffed Global NAPs' attempt to opt into the Verizon-Sprint agreement. Id. It approved Verizon's proposed final agreement and ordered the parties to sign and file that agreement. The parties eventually[4] filed a final agreement on March 18, 2003, including § 7.3.8, and it is the agreement currently in effect between the parties.

In the meantime, on December 30, 2002, Global NAPs brought an action in federal district court challenging the merits of the DTE's arbitration determination. Global Naps I, 396 F.3d at 20. In its complaint, Global NAPs asserted that the DTE "lacked jurisdiction to impose access charges on ISP bound traffic." It also complained that the DTE's reasoning, at least with respect to ISP-bound traffic, was "wholly at odds with the ISP Remand Order."[5]

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[4] On March 14, 2003, the DTE, noting that Global NAPs had still not complied with its February 19, 2003 order, directed the parties to file a fully executed interconnection agreement.

[5] In its complaint, Global NAPs challenged a number of other determinations made by the DTE, including the imposition of transport costs on Global NAPs and the rejection of Global NAPs' proposal to expand local calling areas. On October 28, 2005, after the district court's summary judgment

The February 19, 2003 ruling by the DTE rejecting Global NAPs' attempt to opt in to the Sprint-Verizon agreement led Global NAPs to file a second action in district court, on March 3, 2003.

On March 11, 2003, Global NAPs, Verizon and the DTE moved to consolidate Global NAPs' two federal actions, and asked the district court to first resolve the question of whether Global NAPs was permitted to opt in to the Sprint-Verizon agreement before ruling on the challenge to the arbitration agreement. On May 12, 2004, the district court affirmed the DTE's decision not to allow Global NAPs to opt in to the Sprint-Verizon agreement. Global Naps I, 396 F.3d at 21. On January 19, 2005, in Global Naps I, we affirmed that judgment. Id. at 28.

Global NAPs then revived its challenge to the DTE's December 12, 2002 arbitration order by filing a motion for partial summary judgment in the district court on May 20, 2005.[6] Global NAPs argued that in

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decision leading to this appeal, Global NAPs stipulated to the dismissal with prejudice of its remaining challenges to the DTE's decision.

[6] After this court's opinion in Global Naps I, Verizon demanded that Global NAPs pay the accrued access charges that Global NAPs had failed to pay during the pendency of litigation. As of February 2005, according to Verizon, Global NAPs had accrued more than $42 million in unpaid access charges. Verizon threatened to cut off service to Global Naps If payment was not made. Global NAPs filed for a preliminary injunction in the district court, and the district court granted that request, on the condition that Global NAPs post a $1 million bond, and expedited the briefing schedule for the parties' cross-motions for summary judgment.

the ISP Remand Order, "[t]he FCC expressed in unambiguous language its intention to assert exclusive jurisdiction over intercarrier compensation for ISP-bound traffic." Thus, it argued, the DTE lacked the authority to require Global NAPs to enter into an interconnection agreement that included § 7.3.8, which required Global NAPs to pay Verizon access charges for all VNXX traffic, including traffic bound for ISPs.[7] Global NAPs based its preemption argument solely on the FCC's ISP Remand Order.

Verizon and the DTE filed motions for partial summary judgment in response, arguing that the ISP Remand Order did not preempt the DTE from imposing access charges for non-local ISP-bound traffic, but dealt only with the narrow issue of reciprocal compensation for ISP-bound calls within a local calling area.

On September 21, 2005, the district court granted Verizon and the DTE's motions for partial summary judgment. The district court correctly noted that it was "unclear" whether the ISP Remand Order preempted state commissions from imposing access charges on all ISP-bound traffic. But it did not reach the merits of that question; it held that since Global NAPs "voluntarily sought arbitration by DTE after

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[7] Global NAPs argued that its petition for arbitration did not raise the issue of whether access charges could be imposed on ISP-bound traffic, and so, under 47 U.S.C. § 252(b)(4)(A), the DTE could not decide the issue. The district court rejected this argument, finding that it was sufficient that Global NAPs had raised the issue of access charges for VNXX traffic generally to the DTE. Global NAPs does not press this argument on appeal.

the FCC issued the ISP Remand Order and thus impliedly consented to DTE's jurisdiction over its petition, it may not now challenge DTE's authority on the basis of unsettled law in order to avoid the consequences of its own business strategy."

Global NAPs appeals, arguing (1) that it did not waive any claim regarding the preemptive effect of the FCC's ISP Remand Order or impliedly consent to the DTE's authority to decide the issue which had been preempted by the ISP Remand Order, and so the district court erred in not reaching the merits of its claim; and (2) that this court should reach the merits and find that the ISP Remand Order preempts the DTE from imposing access charges for ISP-bound traffic.[8]

III.

The District Court's "Jurisdictional" Holding

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[8] On November 1, 2005, Global NAPs moved this court to issue a preliminary injunction to stop Verizon from cutting off service pending appeal. On November 2, 2005, we issued an order enjoining Verizon from cutting off service to Global NAPs, conditioned on Global NAPs' payment of additional security in an amount determined by the district court, and expedited our review. The district court, on November 9, 2005, entered an order requiring $15 million in additional security, which Global NAPs posted on November 14, 2005.

The district court's conclusion that Global NAPs could not obtain review of the DTE's preemption decision, because Global NAPs had "impliedly consented to the DTE's jurisdiction over its petition," was error. The issue of preemption was squarely presented to the DTE, the DTE decided this issue of federal law, and Global NAPs challenged that decision before the district court. The district court should have reviewed the DTE's conclusion, as it would any other conclusion of federal law by a state commission.

Global NAPs admits that in its petition for arbitration, it did not explicitly spell out its views with respect to intercarrier compensation for ISP-bound traffic,[9] but points to a number of instances during the administrative proceedings in which it did. In testimony during the hearing before the DTE on October 9, 2005, Global NAPs' expert, Lee Selwyn, testified with respect to the VNXX issue as follows:

> Let me first preface my remarks on [the VNXX issue] by making the point that we are speaking here of traffic originating by Verizon customers, terminating to Global NAPs, that is not ISP-bound traffic. ISP-bound traffic is not subject to any treatment other than

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[9] Global NAPs states that it did not do so because it was laboring under the impression that there was no real dispute on the issue.

> the reciprocal compensation arrangement as set forth in the FCC's ISP Remand Order.

In its brief to the DTE after the hearing, Global NAPs reiterated this point:

> In the ISP Remand Order, the FCC determined that inter-carrier compensation for ISP-bound traffic is solely within the jurisdiction of the FCC and that on a going forward basis, state commissions have been preempted from addressing the issue. Thus the Department has no jurisdiction to impose access charges or other limitations on ISP in-bound traffic.... The Arbitration Order should be clear that the Interconnection Agreement is not intended to regulate inter-carrier compensation for ISP-bound traffic in any manner.

Global NAPs made the same argument in its reply brief to the DTE and in a February 27, 2003 letter to the DTE after the DTE issued its December 12, 2002 order. The DTE rejected these arguments, requiring Global NAPs to pay access charges to Verizon for ISP-bound VNXX traffic under the intrastate tariffs.

Global NAPs also argues that it could not voluntarily consent to the jurisdiction of the DTE to

determine access charges, because the TCA requires arbitration before the DTE under 47 U.S.C. § 252(b) when negotiation leaves open issues, and because "[t]he DTE may not enlarge its own subject matter jurisdiction beyond that granted to it by the Act and FCC rulings implementing the TCA. Neither may DTE jurisdiction be expanded by agreement of DTE litigants."

Global NAPs' use of the phraseology of jurisdiction may have led to some confusion. Questions about federal preemption of state law in this context may or may not be properly thought of as "jurisdictional" in nature. Cf. Wolf v. Reliance Standard Life Ins. Co., 71 F.3d 444, 446-49 (1st Cir. 1995) (holding that ERISA preemption is not jurisdictional but a waivable affirmative defense).

In the end, however the claim is characterized, Global NAPs properly presented an issue of federal preemption to the DTE, and the DTE rejected Global NAPs' argument. This does not mean it waived federal court review of the DTE's conclusion on that question. See Global Naps I, 396 F.3d at 21-22 ("[T]he federal courts have subject matter jurisdiction to review state agency determinations under the TCA for compliance with federal law, pursuant to 28 U.S.C. § 1331."); United States v. R.I. Insurers' Insolvency Fund, 80 F.3d 616, 619 (1st Cir.1996) ("[A] federal preemption ruling presents a pure question of law subject to plenary review.").

IV.

Preemptive Effect of the ISP Remand Order

We reach the merits of Global NAPs' claim, confining ourselves to the record before the agency. This case presents a pure issue of law and the parties have asked us to decide it. Furthermore, we may affirm on any ground supported by the record. See Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 13 (1st Cir.2003).

Before reaching the merits of Global NAPs' claim, however, we must deal with an issue raised by the DTE, but rejected by Verizon, regarding the appropriate standard of review of state commission conclusions of federal law made pursuant to an arbitration under 47 U.S.C. § 252(b).

A. Standard of Review of the DTE's Determination of Preemption Issue

The DTE argues that "judicial review of an interpretation of the [TCA] by a state commission in an arbitration should be limited to the question whether the state commission's interpretation of the [TCA] is reasonable."[10] The DTE draws an analogy to

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[10] To the extent the DTE is arguing for a broad, Chevron-like deference to the state agency whenever it has made a determination regarding the meaning of an FCC order, See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), that line of reasoning has already been foreclosed by this court in Global Naps I: "Since the FCC, and not the individual state

the deferential standard of review given arbitral awards under the Federal Arbitration Act (FAA), as expressed in cases like JCI Communications, Inc. v. International Brotherhood of Electrical Workers, Local 103, 324 F.3d 42, 48 (1st Cir.2003).

The DTE argues that because Congress used the term "arbitration" in § 252(b), we should treat state commission arbitral decisions with the same deference as arbitral decisions under the FAA, which predates the TCA. The DTE points out that Congress used terms other than "arbitration" to describe other types of actions taken by state commissions.

The DTE's position has no basis either in the TCA, its legislative history, or in case law. The DTE points to nothing more than the use of the term "arbitration" in the TCA. The DTE's argument, furthermore, is in flat conflict with our holding in Global Naps I, where, in the context of review of a decision pursuant to an arbitration, we held that determinations of federal law by state agencies under the TCA were subject to de novo review. See 396 F.3d at 23. We noted in Global Naps I that "[e]ach of the Circuits that has addressed the standard of review under the TCA has held that where the state agency determination rests principally on an interpretation

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commissions, is the agency with the power granted by Congress to administer the TCA, through the formulation of policy, rulemaking, and regulation, we do not afford deference to the DTE's interpretation of the statute under [Chevron]." 396 F.3d at 23 n. 7.

of the TCA, de novo review is applied." Id. at 23 n. 8. A number of circuits have reached this conclusion in the context of federal court review of state commission arbitrations under the TCA. See, e.g., MCI Telecomms. Corp. v. Ohio Bell Tel. Co., 376 F.3d 539, 548 (6th Cir.2004) (de novo review of questions of federal law after state commission arbitration); Ind. Bell Tel. Co. v. McCarty, 362 F.3d 378, 383 (7th Cir.2004) (same); MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc., 352 F.3d 872, 876 (4th Cir.2003) (same).

The DTE states that it "does not seek consideration of broader questions [than review of arbitration] regarding the proper standard of judicial review for other determinations by state commissions under the [TCA]." If we were to accept the DTE's position, it would create a strange result. The standard of review would vary not by the nature of the question presented (interpretations of the TCA) but by the nature of the proceeding in which the question is presented. Thus, under the DTE's view, a state commission's conclusions of federal law when it is acting as an arbitrator under § 252(b) would be subject to deferential review, but the very same conclusions about the TCA made pursuant to other state commission proceedings, such as the § 252(e) approval process, would be subject to de novo review. Congress surely did not intend such an odd result merely by using the term "arbitration" in the TCA.

We review de novo the DTE's conclusion that the ISP Remand Order did not preempt its authority to regulate access charges for interexchange VNXX ISP-bound traffic. Cf. Nat'l Tower, LLC v. Plainville

Zoning Bd. of Appeals, 297 F.3d 14, 22 (1st Cir.2002) (holding that issues based on specified provisions of the TCA "present questions that a federal district court determines in the first instance without any deference to the [local zoning] board").

B. Preemption

"The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law." La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). "Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation."[11] Id. at 369, 106 S.Ct. 1890; See also City of New York v. FCC, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988) ("[I]n proper circumstances the agency may determine that its authority is exclusive and preempts any state efforts to regulate in the forbidden area.").

In arguing for a broad reading of the ISP Remand Order, Global NAPs points to language in

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[11] There is no claim that the TCA itself either expressly or impliedly preempts the state regulation in question here. See Grant's Dairy-Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 15 (1st Cir.2000) (describing branches of preemption doctrine).

the order which suggests that all ISP-bound traffic is subject to the FCC's jurisdiction. See, e.g., ISP Remand Order ¶ 1, 16 F.C.C.R. at 9153 ("[W]e reaffirm our previous conclusion [in the Internet Traffic Order] that traffic delivered to an ISP is predominantly interstate access traffic subject to [the FCC's jurisdiction]."); Id. ¶ 57, 16 F.C.C.R. at 9177-78 (finding that ISP-bound traffic is "properly characterized as interstate access" and thus is subject to FCC jurisdiction). Even assuming that this language could cover the non-local ISP-bound calls at issue here, it does not help answer the question before us. A matter may be subject to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation. The question before us is whether the FCC intended in the ISP Remand Order to exercise its jurisdiction over the precise issue here, to the exclusion of state regulation. See Qwest Corp. v. Scott, 380 F.3d 367, 372 (8th Cir.2004) ("There is no dispute in this case that the FCC has the power to preempt states from establishing standards and requiring reports relating to special access services. The fighting issue is whether the FCC actually intended to do so....").

In this context, the law requires a clear indication that an agency intends to preempt state regulation. Hillsborough County v. Automated Med. Labs. Inc., 471 U.S. 707, 718, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) ("[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, ... we can expect that they will make their intentions clear if they intend for their regulations to be exclusive."); See also Qwest Corp., 380 F.3d at 374 (finding no preemption of state

regulation where FCC regulations were "notably agnostic" on the question).[12]

The requirement of a clear indication of the agency's intent to preempt is especially important in the context of the TCA, which "divide[d] authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states." Global Naps II, 427 F.3d at 46 (quoting P.R. Tel. Co. v. Telecomms. Regulatory Bd., 189 F.3d 1, 8 (1st Cir.1999)). As we noted in Global Naps II, "[t]he goal of preserving a role for the state regulatory commissions is reflected in a number of provisions in the TCA." Id. at 46-47.

Also relevant is Congress's express pre-TCA instruction that "nothing in this chapter [including 47 U.S.C. §§ 251, 252] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b); See also La. Pub. Serv. Comm'n, 476 U.S. at 370, 379, 106 S.Ct. 1890 (relying

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[12] This requirement of clarity applies to express preemption, See Hillsborough County, 471 U.S. at 713, 105 S.Ct. 2371, and to certain types of implied preemption, See Id. at 718, 105 S.Ct. 2371 (describing requirements of "field" preemption); Geier v. Am. Honda Motor Co., 529 U.S. 861, 881, 885, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (conflict preemption should not be found "too readily in the absence of clear evidence").

on § 152(b) to find that the FCC could not preempt state law depreciation regulation).

With these principles in mind, we turn to the facts of this case. Global NAPs does not challenge the DTE's determination that whether a call is local or "interexchange" should be based on the geographic endpoints of the call, or the decision to impose access charges on non-ISP-bound VNXX calls. Rather, the challenge is to the DTE's imposition of access charges on that subset of VNXX calls that are bound for an ISP. Global NAPs argues that we should determine the scope of preemption by limiting our examination to the text of the ISP Remand Order. Verizon and the DTE[13] ask us to also consider the context in which the order was passed and the regulatory objectives of the order; they argue that the FCC only intended to preempt state regulation of intercarrier compensation for local ISP-bound traffic and did not address the question before the DTE.

Regardless of which approach is used, the ISP Remand Order does not clearly preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic; it is, at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here.

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[13] The DTE has joined almost all of Verizon's arguments on the merits. At oral argument, the DTE explained that it did not wish to join Verizon's arguments to the extent that they reached outside the scope of the arbitration between the parties.

Global NAPs cannot point to any language in the order that explicitly preempts state regulation of access charges for the non-local ISP-bound traffic at issue. Instead, Global NAPs' central argument is that, in preempting state regulation of intercarrier compensation for ISP-bound traffic in the ISP Remand Order, the FCC did not expressly limit itself to traffic originating and terminating within a local calling area. It suggests that the interim federal regime of intercarrier compensation established by the ISP Remand Order actually applies to all ISP-bound calls, so that the preemptive effect of the order should extend to the access charges at issue here. Global NAPs points in particular to paragraph 82 of the ISP Remand Order, in which the FCC stated:

> The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements....This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.

ISP Remand Order ¶ 82, 16 F.C.C.R. at 9189, 2001 WL 455869. It argues that if the FCC intended only to preempt state regulation of reciprocal compensation for local ISP-bound traffic, it would have expressed its intent more clearly, by specifying "local ISP-bound traffic."[14]

Global NAPs' argument ignores an important distinction. The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic. Cf. Shaw's Supermarkets, Inc. v. N.L.R.B., 884 F.2d 34, 36 (1st Cir.1989) ("The law that governs an agency's significant departure from its own prior precedent is clear. The agency cannot do so without explicitly recognizing that it is doing so and explaining why.").

Indeed, in the ISP Remand Order itself, the FCC reaffirmed the distinction between reciprocal

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[14] Global NAPs also argues that we "confirmed" the preemptive effect of the ISP Remand Order in Global Naps II, in which we said that the "FCC ... made clear that it had exclusive regulatory authority to address the issue, so that state commissions no longer have the power to do the same." 427 F.3d at 40. This was not a holding of the case; rather, it appeared in the background section of the opinion and merely paraphrased ¶ 82 of the ISP Remand Order.

compensation and access charges. It noted that Congress, in passing the TCA, did not intend to disrupt the pre-TCA access charge regime, under which "LECs provided access services ... in order to connect calls that travel to points-both interstate and intrastate-beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time." ISP Remand Order ¶ 37, 16 F.C.C.R. at 9168.

Furthermore, the context in which the ISP Remand Order was issued casts additional doubt on Global NAPs' contention. The Supreme Court has held that in interpreting its own prior cases "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." See Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, ----, 126 S.Ct. 990, 996, 163 L.Ed.2d 945, ---- (2006) (internal quotation marks omitted) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400, 5 L.Ed. 257 (1821)). Such a rule also properly applies to interpretations of agency orders, especially where the order itself details the background against which it was passed. See Qwest Corp., 380 F.3d at 373-74 ("The FCC's statement ... is susceptible of a broader interpretation if plucked out of context, but we conclude that when the [FCC order] is read as a whole, the [FCC's] expressed intent to preempt state regulation does not extend to performance measurements and standards.").

The issue that necessitated FCC action in the Internet Traffic Order and the ISP Remand Order

was "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by a competing LEC." ISP Remand Order ¶ 13, 16 F.C.C.R. at 9159, 2001 WL 455869; See also WorldCom, Inc., 288 F.3d at 430 (stating that the question before the FCC involved "calls made to [ISPs] located within the caller's local calling area"). The order expressly holds at a number of points that ISP-bound traffic is not subject to reciprocal compensation under § 251(b)(5). See ISP Remand Order ¶ 23, 16 F.C.C.R. at 9163, 2001 WL 455869 ("In [the statutory analysis] section, we reexamine our findings in the [Internet Traffic Order] and conclude that ISP-bound traffic is not subject to the reciprocal compensation requirement in section 251(b) ...."); Id. ¶ 44, 16 F.C.C.R. at 9172 ("ISP-bound traffic...is excepted from the scope of the 'telecommunications' subject to reciprocal compensation under section 251(b)(5)."). There is no express statement that ISP-bound traffic is not subject to access charges.

In issuing the ISP Remand Order and setting forth the interim federal intercarrier compensation regime, the FCC was focused on limiting the problem of regulatory arbitrage. Id. ¶ 77, 16 F.C.C.R. at 9187, 2001 WL 455869 (the interim compensation regime "serves to limit, if not end, the opportunity for regulatory arbitrage"). In discussing these regulatory arbitrage opportunities, the FCC mentions only the problems created by requiring reciprocal compensation for ISP-bound traffic. Id. ¶ 68, 16 F.C.C.R. at 9181-82 ("Carriers ... have the incentive to seek out customers, including but not limited to

ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.").[15]

This court invited the FCC to file a brief as amicus curiae on the question of the preemptive effect of the ISP Remand Order. The FCC's helpful brief, while not taking a position on the outcome of this appeal, nonetheless supports the conclusion that the order did not clearly preempt state regulation of intrastate access charges. The brief states that "[t]he ISP Remand Order does not provide a clear answer to [the] question" of whether the order "was intended to preempt states from establishing" a requirement of intercarrier compensation for interexchange VNXX ISP-bound calls. It notes that "[i]n some respects, the ISP Remand Order appears to address all calls placed to ISPs" but also that "the administrative history that led up to the ISP Remand Order indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area." Thus it concludes that the ISP Remand Order "can be read to support the interpretation set forth by either party in this dispute."

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[15] Indeed, Verizon suggests that interpreting the ISP Remand Order as preempting state access charge regulation as well as reciprocal compensation regulation would create new opportunities for regulatory arbitrage, by requiring Verizon to pay compensation on all calls to ISPs, including "toll-free calls to ISPs ... for which [ILECs] had previously received compensation under established rules."

The FCC further notes that "in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller." According to the FCC, "[t]he Commission itself has not addressed application of the ISP Remand Order to ISP-bound calls outside a local calling area" or "decided the implications of using VNXX numbers for intercarrier compensation more generally."

In response to the FCC's brief, Global NAPs makes an argument that the DTE's imposition of access charges on VNXX ISP-bound traffic "stands as an obstacle to the accomplishment and execution of the full objectives of Congress" because the charges "obstruct the FCC's declared policy of a uniform, rather than patchwork, approach to the entire field of inter-carrier compensation" and "obstruct the FCC's effort to implement key policies served by the [TCA]: universal service and competition in the provision of such service." This particular argument, if raised at all during initial briefing or oral argument, was barely done so and may have been waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir.1990). Nonetheless, we address the point.

The Supreme Court has stated that, in determining whether a federal agency regulation impliedly preempts state law because it poses an obstacle to federal policy, "a court should not find preemption too readily in the absence of clear evidence of a conflict." See Geier v. Am. Honda Motor Co., 529 U.S. 861, 881, 885, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (finding, in that case, such clear evidence). Global NAPs does not point us to any clear

evidence, in the ISP Remand Order or elsewhere, that the DTE's imposition of access charges on interexchange VNXX ISP-bound calls will obstruct the implementation of federal objectives.

As to the FCC's purported policy of a uniform approach to the "entire field" of intercarrier compensation, the ISP Remand Order was focused on a particular issue of intercarrier compensation; the FCC deferred fuller consideration of a unified system of intercarrier compensation to a future rulemaking. See ISP Remand Order ¶ 2, 16 F.C.C.R. at 9153 ("[I]n this Order we...take interim steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic while we consider the broader issues of intercarrier compensation in the [Intercarrier Compensation NPRM] proceeding."). As to the second point about access charges serving as an obstacle to the goal of universal service and competition for that service, Global NAPs says that the access charges will "virtually eliminate competition in the non-broadband internet access market." In the face of the FCC's long-standing recognition of state authority over intrastate access charges, and in the absence of clear evidence that the access charges here would impede competition, this argument is insufficient to find implied preemption.[16]

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[16] Global NAPs, in its reply to the FCC's amicus brief, also asks us to refer the question of the preemptive effect of the ISP Remand Order to the FCC under the doctrine of primary jurisdiction. This was an argument certainly not discussed in the initial briefing or at oral argument, and we deem it waived. Zannino, 895 F.2d at 17.

We find that there is a lack of clarity about whether the ISP Remand Order preempts state regulation of the access charges at issue here.[17] Given the requirement of a clear indication that the FCC has preempted state law, the ISP Remand Order does not have the broad preemptive effect that Global NAPs seeks to assign to it.

V.

We affirm the entry of judgment for Verizon and the DTE. Costs of appeal are awarded to Verizon and the DTE. The case is remanded to the district court for any further proceedings.

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[17] Global NAPs relies on a decision by a Connecticut federal district court, S. New Eng. Tel. Co. v. MCI WorldCom Commc'ns, Inc. (SNET), 359 F.Supp.2d 229 (D.Conn.2005), which held that the ISP Remand Order was unambiguous in its preemption of state regulation of intercarrier compensation for all ISP-bound traffic. Id. at 232. We simply disagree with the SNET court's analysis.

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 02-12489-RWZ

GLOBAL NAPS, INC.

v.

VERIZON NEW ENGLAND INC. ET AL.

MEMORANDUM OF DECISION

September 21, 2005

ZOBEL, D.J.

In 1996, Congress passed the Telecommunications Act that, among other changes, opened the market for local telephone service. The Act required companies with historic control over local telephone service, known as incumbent local exchange carriers ("ILECs"), to negotiate interconnection agreements with competitive local exchange carriers ("CLECs"). Plaintiff Global NAPS, a CLEC, initiated such negotiation with defendant Verizon New England ("Verizon"), an ILEC, in January of 2001. Because these negotiations failed to produce contractual terms acceptable to plaintiff, it requested arbitration by defendant Massachusetts Department of Telecommunications and Energy ("DTE") in July of 2002, as permitted under the Act. DTE issued an Arbitration Order in December of 2002 with terms even less satisfactory to plaintiff.

Immediately thereafter, plaintiff filed suit against Verizon and DTE seeking relief from the Arbitration Order. In early 2003, plaintiff attempted to resolve the situation by proposing alternate terms from another competitor's interconnection agreement with Verizon. Because Verizon opposed this proposal, DTE rejected it. Consequently, plaintiff filed a second suit challenging DTE's rejection order, and this second suit was consolidated with the earlier one.

This Court has already decided one round of summary judgment motions by all parties in which plaintiff unsuccessfully challenged the substance and binding nature of DTE's orders. In the instant motion for partial summary judgment, plaintiff tries a different approach to undermining DTE's orders by arguing that DTE lacked jurisdiction over the question of certain access charges for telephone calls to internet service providers ("ISPs"). In response, Verizon moves for partial summary judgment on the same issue. DTE joins Verizon's motion except to the degree that it argues for de novo review of DTE's legal conclusions or as regards the status of future or pending matters before DTE.

Federal law governing interconnection agreements requires DTE to "limit its consideration of any petition ... to the issues set forth in the petition and in the response, if any...." 47 U.S.C. § 252(b)(4)(A). Issues that directly relate to those raised in the petition and that both parties addressed may also be considered by DTE. See BellSouth Telecommunications, Inc. v. Cinergy Communications Co., 297 F.Supp.2d 946, 951-952 (E.D.Ky.2003). See also, MCI Telecommunications Corp. v. Michigan Bell

Telephone Co., 79 F.Supp.2d 768, 774 (E.D.Mich.1999), and Global NAPS, Inc. v. Verizon New England Inc., 327 F.Supp.2d 290, 298 (D.Vt.2004). Plaintiff contends that its petition for arbitration never raised the issue of intrastate access charges for interstate telephone traffic and, therefore, never authorized DTE to rule on the matter. This position is entirely at odds, however, with the fact that plaintiff's initial brief in support of its petition for arbitration by DTE specifically addressed, as two of four intercarrier compensation issues, "whether Verizon can impose access transport charges on [plaintiff] when it utilizes [certain virtual codes for re-routing calls from one exchange to another]" and "whether Verizon can impose access charges for terminating [plaintiff's] local traffic...." O'Malley Decl., Ex. D at 4.

Plaintiff also argues that a certain ruling (the "ISP Remand Order") by the Federal Communications Commission (the "FCC") in 2001 preempted review by state commissions of matters concerning intercarrier compensation for telephone calls to ISPs. Naturally, Verizon argues to the contrary. Although "several states and state regulatory commissions complain[ ] that the order unlawfully preempts their authority to determine the compensation of ISP-serving [local exchange carriers]," the District of Columbia Circuit Court of Appeals questioned the legal support for the order. Worldcom, Inc. v. Federal Communications Commission, 288 F.3d 429, 432-434 (D.C.Cir.2002). Whether the FCC preempted state commissions such as DTE from resolving compensation disputes regarding telephone traffic to ISPs remains unclear,

but resolution of this complex issue is not necessary in order to decide the instant motions. As plaintiff voluntarily sought arbitration by DTE after the FCC issued the ISP Remand Order and thus impliedly consented to DTE's jurisdiction over its petition, it may not now challenge DTE's authority on the basis of unsettled law in order to avoid the con-sequences of its own business strategy.

Plaintiff voluntarily withdrew a separate argument for partial summary judgment alleging discriminatory treatment of its petition by DTE. See Pl.'s Reply in Supp. of Its Mot. for Summ. J. 4.

Accordingly, plaintiff's motion for partial summary judgment (# 76 on the docket) is denied, and defendants' cross-motions for partial summary judgment (# 81 and # 83 on the docket) are allowed.

September 21, 2005 /s/ Rya W. Zobel
DATE RYA W. ZOBEL UNITED STATES

D.T.E. 02-45 December 12, 2002

Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts.

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I. INTRODUCTION

This arbitration proceeding between Global NAPs, Inc. ("GNAPs" or "Global") and Verizon New England, Inc. d/b/a Verizon-Massachusetts ("Verizon") (collectively, "Parties") is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act").[1] By this Order, the Department of

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[1] Section 252(b) of the Act permits a carrier to petition a state commission to arbitrate any issues left unresolved after voluntary negotiations between the carriers have occurred. 47 U.S.C. § 252(b)(1).

Telecommunications and Energy ("Department") makes findings necessary to finalize an interconnection agreement between the Parties.

Verizon is an incumbent local exchange carrier ("ILEC"), as defined by the Act, within the Commonwealth of Massachusetts. GNAPs is a competitive local exchange carrier ("CLEC") with an approved tariff to provide local exchange service to residential and business customers throughout Massachusetts.

II. PROCEDURAL HISTORY

On July 30, 2002, GNAPs filed a Petition for Arbitration of an interconnection agreement with Verizon ("Petition"). Verizon responded to GNAPs' Petition on August 22, 2002 ("Response"). On September 4, 2002, the Department held a procedural conference and technical session. On September 10, 2002, the Parties filed direct testimony. GNAPs filed the testimony of William J. Rooney, Vice President and General Counsel of GNAPs; and Lee L. Selwyn, President of Economics and Technology, Inc. Verizon filed the testimony of Terry Haynes, Manager, State Regulatory Policy and Planning Group; Karen Fleming, Manager - Risk Management; Jonathan B. Smith, Executive Director - Local Interconnection Billing and Wholesale Billing Support; William Munsell, Negotiator - Interconnection Contracts; and Peter J. D'Amico, Senior Product Manager -

Interconnection Product Management Group. Pursuant to the arbitration schedule, the Parties filed a First and Second Stipulation of Issues on September 10 and September 25, 2002, respectively.[2] The evidentiary hearing was held on October 9, 2002, at which GNAPs presented its witness, Lee Selwyn, and Verizon presented Terry Haynes and Peter D'Amico as witnesses.[3] On October 17, 2002, the Parties filed record request responses.[4] Finally, on October 21 and 28, 2002, the Parties filed their initial and reply briefs, respectively.

The twelve issues for the Department's resolution are related to: (1) the designation of a single Point of Interconnection; (2) responsibility for the costs associated with transporting telecommunications traffic to the single Point of Interconnection; (3) the definition of local calling

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[2] The Parties did not reach any additional agreements in the Second Stipulation of Issues since the filing of the First Stipulation of Issues.

[3] The Parties presented witnesses on only the first four issues raised in the Petition, and agreed to waive cross-examination on the remaining issues.

[4] Also on October 17, 2002, pursuant to G.L. c. 25, § 5D, Verizon filed a Motion for Protective Treatment of Confidential Information contained in its responses to RR-DTE-4. The Department has reviewed the response to RR-DTE-4 and agrees that the data contained therein include specific customer proprietary information for Massachusetts and other Verizon states relating to Verizon' s interstate Internet Protocol Routing Service ("IPRS") that may properly be protected from public disclosure under § 5D. Accordingly, the Department grants Verizon's motion.

areas; (4) the use of virtual NXX codes; (5) the "change of law" provisions; (6) two-way trunking; (7) the appropriateness of incorporating by reference other documents into the interconnection agreement; (8) insurance requirements; (9) audit rights; (10) reciprocal collocation; (11) the "applicable law" provision; and (12) obligations during network upgrades and maintenance.[5]

III. STANDARD OF REVIEW

The standards for arbitrations by state commissions are set forth in 47 U.S.C. § 252(c), which states, in relevant part, that a state commission shall:

> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications Commission ("FCC")] pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to [section 252(d).]

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[5] The first nine issue were presented by GNAPs in its Petition. Verizon raised three additional issues in its Response.

Additionally, § 251 (c)(2) of the Act defines the obligations for ILECs to interconnect with other carriers. Specifically, each ILEC has the duty:

> [T]o provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] and section 252.

Furthermore, § 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards and requirements."

IV. UNRESOLVED ISSUES

Each of the nine issues GNAPs presents to the Department contains a general policy question. The nine issues also present specific disputes over precise contract language. Many of these disputes Verizon challenges as unrelated to the broad policy questions identified. The three additional issues Verizon presents to the Department focus on specific contract language in dispute. As to the resolution of the issues presented by GNAPs, GNAPs requests that the Department render decisions only on the broad policy issues it identifies in its Petition, and then order the Parties to implement contract language embodying these policy decisions (GNAPs Petition ¶ 13). Verizon opposes this approach and asks the Department to rule on the specific contract language in dispute (Verizon Brief at 2).

Resolving the general policy issues and as many as we can of the particular contract language disputes is the better approach. Resolution of only the policy issues would leave a significant portion of the disputed contract language unresolved, and thus would only delay finalization of the Parties' interconnection agreement. Accordingly, in this Order, we seek to resolve all disputed contract language. At a minimum, we endeavor to provide sufficient direction to allow the Parties to resolve their differences.[6] Lastly, we note the Department

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[6] For contract language that we do not directly address, because, for instance, the record is insufficient to address, or, for

will review all modified contract language during the compliance phase of this proceeding.

A. Should Either Party be Required to Install More Than One Point of Interconnection ("POI") per LATA? (Arbitration Issue No. 1)

Should Each Party Be Responsible for the Costs Associated with Transporting Telecommunications Traffic to the Single POI? (Arbitration Issue No. 2)

1. Introduction

For Arbitration Issue No. 1, the Parties do not disagree that GNAPs has the right to designate a single POI[7] ("SPOI") per LATA. In fact, the Parties state that while they have reached conceptual agreement on this issue, they have not arrived at

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contract language that cannot be resolved based upon the direction we provide in this Order, we direct the Parties to continue to negotiate these provisions with particular attention to any relevant policy findings contained herein. In the event that the Parties are unable to craft mutually-agreeable contract language for such provisions, if any, for submission during the compliance phase of this arbitration proceeding, each party shall present its proposed contract language and provide specific support for its position in the compliance filing.

[7] The POI is the point where Verizon's network physically interconnects with the CLEC's network (See Tr. at 23).

contract language to implement that agreement. See First and Second Stipulation of Issues.

Arbitration Issue No. 2 involves the issue of financial responsibility for transporting telecommunications traffic. GNAPs argues that each carrier is responsible for transporting telecommunications traffic to the GNAPs determined SPOI and Interconnection Point8 ("IP").[8] Verizon, however, argues that consistent with Department precedent, GNAPs must compensate Verizon, in accordance with prior Department orders, for GNAPs-originated traffic that Verizon transports from the SPOI to Verizon's multiple IPs located at its tandem or end offices.

GNAPs contends that it is necessary to integrate Arbitration Issue Nos. 1 and 2 because "if the effect of Verizon's position on Issue 2 is to impose financial penalties on Global NAPs for electing a single point of interconnection, then [GNAPs] believe[s] that operates to undermine the true characterization of Verizon's position on Issue 1" (GNAPs Brief at 15, citing Tr. at 21). Because we find that Arbitration

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[8] The IP is the "point on the terminating carrier's network from which the terminating carrier will provide transport and terminate on its network a call delivered by an originating carrier." See MediaOne/Bell Atlantic Arbitration, D.T.E. 99-42/43-A at 4, n.6 (March 15, 2001) ("MediaOne Supplemental Order"). In other words, the IP is the rating point that determines financial responsibility for transport and termination costs, including reciprocal compensation. See id.; See also Tr. at 24.

Issue Nos. 1 and 2 are intertwined, the Department addresses them together.

2. Positions of the Parties

a. GNAPs

GNAPs claims that each party should be responsible for transporting its own traffic on its side of the POI (GNAPs Brief at 14). According to GNAPs, the reciprocal compensation rules and the ISP Remand Order[9] "mirroring rule" prohibit imposition of a transport charge on intra-exchange traffic (Id. at 16). GNAPs claims that Verizon should not be able to impose a transport charge on intra-exchange traffic above and beyond the reciprocal compensation it recovers because such an approach violates Rule 703(a)[10] and also constitutes double recovery (Id. at 17). GNAPs further argues that because Verizon accepted the FCC's rate cap for traffic bound for

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[9] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-13 1 (rel. April 27, 2001) ("ISP Remand Order").

[10] Rule 703(a) states that "[e]ach carrier shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting carrier."

Internet Service Providers ("ISPs"),[11] "Verizon is required to exchange its traffic at the FCC rate, and cannot impose additional transport charges" (Id. at 18).

GNAPs cites to the Virginia Order[12] issued by the Wireline Competition Bureau of the FCC to support its position (GNAPs Brief at 18). According to GNAPs, the Virginia Order rejected Verizon's virtually geographically relevant interconnection points ("VGRIPs")[13] GNAPs acknowledges that

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[11] The FCC adopted an intercarrier compensation rate cap for ISP-bound traffic as an interim measure to resolve problems associated with the current intercarrier compensation regime for ISP-bound traffic. Specifically, the rate cap for ISP-Bound traffic applies "only if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate." ISP Remand Order at ¶¶ 77, 89 (emphasis in original) (footnote omitted).

[12] In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration; Petition of Cox Virginia Telecom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration; and Petition of AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., CC Dockets Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order, DA 02-173 1 (rel. July 17, 2002) ("Virginia Order").

[13] Under Verizon's VGRIPs proposal, geographically relevant CLEC-IPs would be located at a collocation site at

Verizon's proposal in this proceeding differs from the one proposed in Virginia in that Verizon's proposal in Virginia "contemplated that the CLEC was responsible for all transport costs between the Verizon designated IP and the CLEC," while "Verizon's proposal here [in Massachusetts] simply requires that Global be responsible for all transport costs from Global to the Verizon designated IPs" (Id. at 19). GNAPs claims that, notwithstanding this difference, Verizon's proposal in this proceeding "violates the reciprocal compensation rules and the reasoning of the Virginia Order applies" (Id.).

Moreover, GNAPs claims that the authority on which Verizon relies for its position rests on orders that "generally predate the Virginia Order" (GNAPs Brief at 19). GNAPs states that the Virginia Order "dealt expressly with the transport issue and ruled in favor of the CLEC against imposition of transport charges" (Id. at 21). GNAPs further argues that in

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Verizon tandem office in a multiple-tandem LATA, or at other Verizon-designed wire centers in LATAs with no tandem offices. Virginia Order ¶37. VGRIPS is similar to Verizon's geographically relevant interconnection points ("GRIPS") proposal which Verizon has proposed in Massachusetts and other jurisdictions in the past. GRIPS is based on the "proposition that the parties should exchange local traffic with each other within a reasonable geographic proximity to the terminating end user customer, defined by Bell Atlantic as 'geographically relevant point.' According to Bell Atlantic, each party would be responsible for the transport to and from the geographically relevant point, and once the traffic is delivered to an IP, reciprocal compensation charges would apply." D.T.E. 99-52, at 10 (August 25, 1999) (MediaOne) (citations omitted).

arbitrations brought by GNAPs in New York, Illinois, Rhode Island, Connecticut, and Florida, the decisions have been uniformly against imposing transport charges on CLECs (Id. at 23).

Additionally, GNAPs argues that "there is no reasonable basis for imposing transport costs on Global" because Verizon's size allows it to realize significant economies of scale and scope that make its transport costs de minimis (GNAPs Brief at 24). GNAPs further states that the use of fiber optics has caused the cost of transport to decline (Id. at 24-25). GNAPs argues that Verizon seeks to impose transport charges that are in excess of its costs (Id. at 26-27). In support of this position, GNAPs submits a "proxy model to evaluate the degree to which Verizon may be over-recovering its transport costs" (Id.). GNAPs claims that the transport costs that Verizon seeks to impose are "excessive and discriminatory" and in violation of §§ 251 (c)(2)(C) and (D) of the Act (Id. at 27). GNAPs concludes by stating that requiring Verizon to pay for all transport on its side of the POI is consistent with rulings of other state ommissions (Id.).

b. Verizon

Verizon does not dispute that GNAPs has the option to designate a SPOI in the LATA within Verizon's network (Verizon Brief at 8). Verizon contends that GNAPs need only interconnect "at any technically feasible point within" Verizon's network, as required by applicable law (Id., citing 47 U. S.C. § 251 (c)(2)(B)). Verizon states that the Parties appear

to have reached "substantive agreement" on this issue, yet GNAPs's contract proposals "do not confine GNAPs' choice of [POI] to any technically feasible point on Verizon's network" (Id.) (emphasis in original).

On the other hand, Verizon claims that its proposed contract language permits GNAPs to physically interconnect with Verizon at a single point on Verizon's existing network (Verizon Brief at 7). Verizon further argues that its proposed language allows the Parties to establish IPs for purposes of determining financial responsibility in accordance with the Department's prior rulings (Id. at 8). Verizon states that "the issue in dispute is whether GNAPs must compensate Verizon in accordance with the Department's orders for GNAPs' originated traffic" (Id. at 8-9).

Verizon argues that valid Department decisions support its position. Specifically, Verizon contends that the Department's Tariff No. 17 Order[14] and MediaOne Supplemental Order found that all local exchange carriers in Massachusetts are responsible for transporting their originating traffic all the way to the terminating end user or paying for transport provided by another carrier to accomplish the same (Verizon Brief at 9). Verizon further argues that the MediaOne Supplemental Order is "exactly on point in this issue" because Verizon and GNAPs are at present interconnected by an End Point Fiber Meet

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[14] Tariff No. 17 Order, D.T.E. 98-57 (March 24, 2000) ("Tariff No. 17 Order").

("EPFM")[15] at GNAPs' Quincy switch (Id., citing Exh. VZ-GNAPs-9). Verizon insists that, "[c]onsistent with [the MediaOne Supplemental Order], GNAPs is responsible for compensating Verizon for the transport of GNAPs' traffic that Verizon provides between the EPFM and Verizon's IP which, pursuant to Verizon's proposed contract language, will be located at Verizon's tandems or end offices serving the terminating end user" (Id. at 10) (footnotes omitted).

Regarding GNAPs' argument that Verizon's transport costs are de minimis, Verizon states that this two-party arbitration is not the appropriate proceeding to reconsider the TELRIC-based unbundled network element ("UNE") rates for dedicated and common transport recently established in the Department's UNE Rates Order[16] (Verizon Brief at 11). Verizon states that the Department, in the D. T. E. 01-20 proceeding, conducted an extensive review of Verizon's costs and established new rates for unbundled dedicated and common transport (Id.). Verizon claims that GNAPs, however, is apparently not satisfied with the results of the UNE Rates Order and seeks, in this arbitration proceeding, to

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[15] An EPFM is a type of mid-span meet (See Verizon Brief at 10). For an EPFM, the POI is designated at the physical location of either the CLEC's or the ILEC's switching point; for a mid-span meet, the POI is designated on the transport facility between the CLEC's and ILEC's switching points (See Tr. at 48).

[16] UNE Rates Investigation, D.T.E. 01-20 (July 11, 2002) ("UNE Rates Order").

collaterally attack the rates established in that order (Id. at 11-12). Verizon argues that the Department should not reach conclusions in this proceeding contrary to those it recently reached in the rate proceeding specifically designed to examine Verizon's costs (Id. at 12).

3. Analysis and Findings

Section 251(c)(2) of the Act requires the incumbent to provide for interconnection with the local exchange carrier's network:

> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> (D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory.

Furthermore, the FCC established additional rules concerning where a carrier must deliver traffic originating on its network to the terminating

carrier.[17] These rules, which were identified by the Wireline Competition Bureau of the FCC in its Virginia Order, establish that:

> (1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network;
> (2) competitive LECs may, at their option, interconnect with the incumbent's network at only one place in a LATA;
> (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination; and
> (4) competitive LECs may refuse to permit other ILECs to collocate at their facilities.

Virginia Order at ¶ 67 (footnotes omitted). Rules 1, 2, and 3 are at the crux of the Parties' dispute for Issues 1 and 2.

Before turning to the issues at hand, we find it appropriate to comment on the weight of the Virginia Order in this arbitration proceeding. The Wireline Competition Bureau of the FCC preempted the jurisdiction of the Virginia State Corporation

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[17] See, e.g., In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325, ¶¶ 209, 1062 (rel. August 8, 1966) ("Local Competition Order").

Commission to arbitrate disputes between Verizon Virginia, Inc. and WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia, Inc., and issued its Virginia Order, standing in the stead of the Virginia State Corporation Commission. Thus, the Virginia Order is analogous more to another state commission decision than an order issued by the FCC.

As a general rule, the Department does not find other state commission decisions to be dispositive on proceedings conducted in Massachusetts. In fact, the Department "ordinarily place[s] little weight on the decisions reached in other states, since we rely for our decisions on the record presented here." Phase 4 Order[18] at 23.[19] But, the Virginia Order is unique.

Although the Wireline Competition Bureau explicitly stated that it was acting in place of the Virginia State Corporation Commission, we nonetheless find it reasonable to place greater weight on the Wireline Competition Bureau's interpretation on the intent and application of FCC rules than we would another state commission's interpretation of

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[18] Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 4) (December 4, 1996) ("Phase 4 Order").

[19] See also UNE Rates Order at 24 ("[T]he Department will not make findings on any issue based solely on the fact that another state (or any number of states) made a similar finding, however useful or instructive other states' actions may be").

the same FCC rules, which we view as merely instructive. In addition, unlike most state arbitration decisions, the Wireline Competition Bureau of the FCC did not consider Virginia law when it rendered its decision. Thus, potential conflicts between another state's law and Massachusetts law are absent. Accordingly, we find the Virginia Order to be persuasive authority; however, we do not consider it binding on the Department because of the fact that it is not a mandate from the FCC.[20] With this in mind, we turn to Arbitration Issue Nos. 1 and 2.

GNAPs is entitled to interconnect at any technically feasible point, which includes the right to select a SPOI in each LATA. But, as noted above, the Parties do not dispute this. Rather, it is the issue of responsibility for transport costs on each carrier's side of the POI that is driving the dispute in Arbitration Issues No. 1 and 2.

As to the issue of financial responsibility raised in Arbitration Issue No. 2, GNAPs suggests that the

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[20] In contrast, in D.P.U./D.T.E. 97-88/97-18-A [Phase II] (August 8, 2001) ("Payphone Reconsideration Order"), the Department found that the Common Carrier Bureau's decision in In the Matter of Wisconsin Public Service Commission Order Directing Filings, 14 FCC Rcd. 9978 (Com. Car. Bur. 2000) ("Wisconsin Order") was binding on state regulators, unless stayed or reversed. Unlike the Wisconsin Order, the Virginia Order is an arbitration decision issued by the Wireline Competition Bureau acting on behalf of the Virginia State Corporation Commission. Thus, we find it appropriate to consider it persuasive, but not binding, authority.

Department's precedent on these issues, which predate the Virginia Order, no longer apply. GNAPs is wrong. The Virginia Order rejected Verizon's language requiring AT&T, Cox, and WorldCom to establish GRIPs or VGRIPs with Verizon at designated or agreed upon points on the carriers' networks. Virginia Order at ¶¶ 37, 51-53. This finding mirrors the Department's own finding which rejected Bell Atlantic's [now Verizon's] GRIP proposal in MediaOne by concluding that "neither the Act nor the FCC's rules require MediaOne or any CLEC to interconnect at multiple points within a LATA to satisfy an incumbent's preference for geographically relevant interconnection points." MediaOne at 41. Nevertheless, GNAPs' argument misses the mark, because Verizon proposes neither GRIPs nor VGRIPs in this arbitration -- an important point of distinction that GNAPs concedes (See GNAPs Brief at 19).

Accordingly, the Department's precedent on these issues is relevant and on point, as Verizon has argued. We further note that our precedent is in accord with Rule 3 contained in the Virginia Order, referenced above. The Department first articulated its policy of shared financial responsibility in MediaOne when the Department found that "[t]he FCC envisioned both carriers paying their share of the transport costs to haul traffic to the meet point under the interconnection rules." MediaOne at 42. The Department elaborated in its Tariff No. 17 Order that:

> [W]here the parties interconnect and exchange traffic at a mid-span meet, Bell Atlantic would

> be forced to provide transport of its originating traffic up to the mid-span meet, and, for CLEC originating traffic, Bell Atlantic would have to provide transport from the mid-span meet to the Bell Atlantic end-user customers. In the latter case, reciprocal compensation payments only compensate Bell Atlantic for the portion of the call from Bell Atlantic's end office or tandem switch to the end-user customers .. Bell Atlantic's costs to transport CLEC-originated traffic from the mid-span meet to its end office or tandem switch are left "stranded."

Tariff No. 17 Order at 130-131. To resolve this transport cost recovery issue, the Department found as follows:

> Transport costs should be assigned in a competitively neutral manner. Carriers are responsible to provide transport or pay for transport of their originating calls, including reciprocal compensation, between their own originating and the other carrier's terminating end-user customers. This is regardless of where the carriers choose to physically interconnect. CLECs may decide where to interconnect with the LEC, but each carrier is responsible to transport its own traffic or to pay the costs of transporting its originating traffic all the way to the terminating end user. Carriers may choose the most efficient method to accomplish this task.

Id. at 133-134. The Department further explained that:

> In the MediaOne situation, if MediaOne chooses to interconnect with Bell Atlantic only at a single mid-span meet in the LATA, then MediaOne shall arrange or pay for transport of MediaOne-originated calls from the meet point to Bell Atlantic's end or tandem office.

MediaOne Reconsideration Order[21] at 16-17. Additionally, the Department stated in the MediaOne Supplemental Order that:

> Both carriers are responsible for delivering their traffic (either through self-provisioning or leasing another carrier's transport) from the Mid-Span Meet to the terminating carriers' appropriate interconnection point ("IP"), which may be located at a remote tandem or end office.

MediaOne Supplemental Order at 4, n. 6. Our precedent is directly on point for Arbitration Issue Nos. 1 and 2, and the Department finds that GNAPs

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[21] MediaOne/Greater Media/Bell Atlantic Arbitration Order. ("MediaOne Reconsideration Order"), DTE 99-43, 99-52 (March 24, 2000).

has not presented a convincing argument to disturb settled precedent.

GNAPs challenges Verizon's imposition of transport costs, alleging that these costs are de minimis and, based on a GNAPs-produced "proxy [cost] model," are in excess of Verizon's costs. The Department recently conducted an 18-month investigation into Verizon's UNE costs in the UNE Rates Order. Our investigation determined that Verizon's transport costs are not de minimis, as GNAPs would have us believe, and we are establishing transport rates accordingly. Moreover, we agree with Verizon that this two-party arbitration is not the appropriate proceeding to reconsider the TELRIC-based UNE findings in the Department's UNE Rates Order. Accordingly, we reject GNAPs' argument.

We now turn to the contract language raised by the Parties. First, the Department agrees with Verizon that Interconnection Attachment §§5.2.2 (Trunk Group Connections and Ordering) and 5.3 (Switching System Hierarchy and Trunking Requirements) are not related to any issue being arbitrated in this proceeding. Nor is there any record evidence upon which to make a determination. Accordingly, we make no findings on the disputed language in these provisions.

Second, Verizon's proposed definitions for IP and POI in Glossary §§2.46 (IP) and 2.67 (POI),[22] and its

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[22] GNAPs refers to Glossary §§2.45 and 2.66 in its Petition, but these sections do not contain any disputed language.

proposed language in Interconnection Attachment §§2.1.1 and 2.1.2, are consistent with the Department's precedent, as discussed above. For that reason, and the reasons discussed below, Verizon's proposed findings are adopted. GNAPs' proposed language attempts to make the IP and the POI one and the same, to give GNAPs the sole discretion in determining the IP for itself and for Verizon, and to shift the burden of transport costs onto Verizon, all in contravention of Department precedent. The IP is the financial demarcation point for termination and transport costs, including reciprocal compensation, while the POI refers to the physical point of interconnection; GNAPs' proposal confuses these concepts and is therefore rejected. Furthermore, GNAPs proposes, without explanation, to define the POI in Glossary §2.67 by citing to 47 C.F.R. §51.319(b) in which the FCC defines the Network Interface Device ("NID"). Because the definition of a NID has nothing to do with a POI, GNAPs' proposal is rejected.

Third, GNAPs' proposed language in Interconnection Attachment §7.1.1.1 attempts to force Verizon to accept as its IPs, for the delivery and termination of reciprocal compensation traffic to Verizon's customers, those IPs that GNAPs selects for itself. That proposal is in violation of our precedent.

Therefore, the Department assumes GNAPs intended to refer to §§2.46 and 2.67, which do contain disputed text related to Arbitration Issue Nos. 1 and 2.

Verizon's proposal, however, is consistent with Department precedent in that each carrier has the right to select its own IPs for this traffic. Accordingly, we adopt Verizon's language.

Similarly, we find GNAPs' proposal, to strike in its entirety Interconnection Attachment §7.1.1.2, to be more consistent with Department policy. More precisely, Verizon's proposal seeks to circumvent Department precedent by forcing GNAPs to forfeit its right to select its IP or IPs. For instance, if GNAPs establishes a collocation site at a Verizon end office wire center, GNAPs may elect, at its sole discretion, that such collocation site be established as the GNAPs IP for traffic originated by Verizon customers served by that end office. Verizon, however, may not dictate that GNAPs designate this collocation arrangement as its IP for Verizon-originated traffic. Accordingly, we adopt GNAPs' proposal.

Additionally, we find that GNAPs' proposal for Interconnection Attachment §7.1.1.3 is more consistent with our precedent, as well as with our findings on Interconnection Attachment §§7.1.1.1 and 7.1.1.2, which permit each party to choose its own IP. Verizon's proposed §7.1.1.3 seeks to force GNAPs to forgo a portion of the intercarrier compensation to which it is entitled if an agreement to transition pre-existing GNAPs IPs to IPs that conform to Interconnection Attachment §7.1.1.1[23] is not reached within 30 days. But, we see no basis under such

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[23] Verizon's proposed language also requires the IPs to conform with §7.1.1.2, which we rejected above.

circumstances to impose a financial penalty for the transition of existing IPs, which were presumably properly established between the Parties. Accordingly we adopt GNAPs' proposed language.

Finally, the Department adopts Verizon's proposed language in Interconnection Attachment §§3.4 and 3.5 regarding alternative interconnection arrangements; namely, end point meet arrangements. Given the number of technical and operational aspects that can vary between two different end point meet arrangements, a case-by-case approach is preferable to the boilerplate language that GNAPs proposes and also is consistent with Department and FCC precedent. See MediaOne at 39; Local Competition Order at ¶ 553.

B. Should Verizon's Local Calling Area Boundaries be Imposed on GNAPs, or May GNAPs Broadly Define its Own Local Calling Areas? (Arbitration Issue No. 3)

1. Introduction

Arbitration Issue No. 3 concerns whether Verizon's local calling areas[24] are binding on GNAPs

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[24] A "local calling area" is the area within which a customer with basic exchange service can place a call without incurring a toll charge. The Department has defined local calling areas as comprising a customer's home and contiguous

on a retail and wholesale basis. GNAPs proposes to offer LATA-wide local calling to its customers; however, the Parties disagree as to whether Verizon's proposed language would bar GNAPs from offering LATA-wide retail calling areas, and whether, for the purpose of intercarrier compensation, GNAPs-originated LATA-wide traffic is properly considered local or toll.

2. Positions of the Parties

a. GNAPs

GNAPs argues that it should be permitted to define its own local calling areas because there is no economic or technical reason for local calling areas to be smaller than a LATA (GNAPs Petition ¶ 41; Exh. GNAPs-1, at 62). But, GNAPs contends, Verizon's proposed Template Agreement forces GNAPs to adopt an inefficient network architecture and prevents GNAPs from offering an economically-viable LATA-wide local calling area service (GNAPs Petition ¶ 44). GNAPs asserts that it is not attempting to dictate the manner in which Verizon divides its retail offerings into "local" and "toll," and thus, by the same token, Verizon should not be permitted to force GNAPs to mirror Verizon's calling areas (Id. ¶ 42).

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exchanges. See New England Telephone and Telegraph Company, D.P.U. 89-300, at 69-70 (1990) ("D.P.U. 89-300").

Moreover, GNAPs argues that the ISP Remand Order established a new regulatory regime that controls all of the intercarrier compensation issues in this arbitration (GNAPs Brief at 5). GNAPs asserts that under the ISP Remand Order, all telecommunications traffic that is not exchange access or information access traffic is subject to the reciprocal compensation rules (Id.). GNAPs contends that because the Act defines exchange access traffic or toll traffic as traffic that is subject to a separate toll charge imposed by the originating carrier, and because GNAPs proposes to offer its customers LATA-wide retail calling areas without the imposition of a separate toll charge, GNAPs-originated calls from one end of a LATA to the other are therefore local calls subject to reciprocal compensation and not to the imposition of access charges by Verizon (Exh. GNAPs-1, at 51; GNAPs Reply Brief at 10).

Consequently, GNAPs contends that Verizon's proposal violates the ISP Remand Order by imposing access charges on local calls (GNAPs Brief at 44). More specifically, GNAPs asserts that traffic originated by GNAPs' customers and terminated by Verizon is reciprocal compensation traffic, not subject to the imposition of access charges (Exh. GNAPs-1, at 53; GNAPs Brief at 45). In addition, GNAPs argues, when Verizon picks up a GNAPs-originated call at the SPOI and delivers it to its own customer within the LATA, Verizon is wholly compensated through the assessment of reciprocal compensation (GNAPs Brief at 46).

GNAPs further argues that the ISP Remand Order "mirroring rule" prohibits Verizon from imposing an additional origination or transport charge on reciprocal compensation traffic (GNAPs Brief at 12). GNAPs asserts that Verizon has adopted the FCC's rate caps for ISP-bound traffic, and therefore the mirroring rule requires that the FCC's rate caps apply to all intercarrier compensation on reciprocal compensation traffic exchanged with GNAPs (Id. at 13). Furthermore, GNAPs argues that because Verizon has consistently argued that competition rather than regulation should control its offerings and prices, Verizon should not now be permitted to retreat behind its calls for a generic proceeding (Exh. GNAPs 1, at 58).

b. Verizon

Verizon states that it accepts GNAPs' right to define its own local calling areas for its retail customers (Verizon Response ¶ 47; Verizon Brief at 29). But, Verizon contends, the real dispute in Issue 3 is the manner in which local calling areas are defined for the purpose of intercarrier compensation, which the Department has already addressed (Verizon Response ¶ 47; Verizon Brief at 29). Specifically, Verizon states that Federal law gives state commissions the authority to determine local calling areas for the purpose of intercarrier compensation (Verizon Response ¶ 51; Verizon Reply Brief at 8).

Verizon states that the Department, however, has not done so, but instead determined, in the Phase 4-B Order,[25] that arbitration proceedings are not the proper forum for considering changes to Verizon's existing tariffed local calling areas because local calling areas present issues of great complexity suitable only for generic proceedings (Verizon Response ¶ 47, citing Phase 4-B Order at 9). Verizon argues that relying on the results of a two-party arbitration to order a change in Verizon's local calling areas for the purpose of intercarrier compensation would be inconsistent with this Department precedent (Exh. VZ-2, at 4; Verizon Reply Brief at 8). Verizon claims that GNAPs' Petition and proposed contract changes add nothing to the Department's previous analysis and thus should be rejected (Verizon Response ¶ 47).

Verizon argues that for practical implementation and compliance with Federal law, calling areas must be symmetrical for the purpose of intercarrier compensation (Verizon Brief at 32). Verizon contends

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[25] Consolidated Petitions of New England telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements between NYNEX and the Aforementioned Companies, Order on Motion by TCG for Reconsideration, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2B) (Phase 4B), (May 2, 1997) ("Phase 4-B Order").

that asymmetrical calling areas would give rise to regulatory arbitrage, where a carrier could pay low reciprocal compensation rates for its customers' outbound calls, but collect a higher access rate for its customers' inbound calls (Exh. VZ-2, at 17; Verizon Brief at 32). Verizon asserts that implementation of GNAPs' proposal would significantly impact its compensation structure and therefore its ability to act as the carrier of last resort, a fact recognized by the Rhode Island Public Utilities Commission (Verizon Brief at 32). Verizon avers that GNAPs' proposal could amount to a Verizon subsidy of GNAPs' operations, a likelihood acknowledged by the New York Public Service Commission (Id. at 35).

Finally, Verizon argues that the "mirroring rule" in the ISP Remand Order does not apply to this case because the mirroring rule requires Verizon to offer to exchange reciprocal compensation traffic at the FCC's interim ISP traffic rates, and also requires GNAPs to accept Verizon's offer, which GNAPs has not done (Verizon Reply Brief at 9). In fact, Verizon maintains that the Parties have agreed not to exchange § 251(b)(5) traffic at the same rates as ISP-bound traffic, and GNAPs should not be heard to argue otherwise (Id. at 11).

3. Analysis and Findings

The issue in this case is not whether GNAPs must mirror Verizon's calling areas on a retail basis. Verizon has stated that GNAPs is free to determine its own retail calling areas, and GNAPs has not identified, nor could the Department find, any

language in the contract that would prevent GNAPs from offering its retail customers whatever retail calling plans it chooses.

The issue is, simply, how to define a local calling area for the purpose of intercarrier compensation. On this question, Department precedent is clear. The Department has already considered and rejected a request to alter Verizon's local calling areas in a two-party arbitration. In Phase 4-B of the Consolidated Arbitrations, Teleport Communications Group, Inc. ("TCG") advanced the same argument as that advanced by GNAPs in this arbitration, that forcing CLECs to abide by Verizon's (then NYNEX) local calling areas for the purpose of intercarrier compensation would have anti-competitive effects, and that TCG should be free to define its own local calling area for both its retail customers and for its intercarrier compensation regime with Verizon. See Phase 4-B Order at 4-5.

The Department rejected TCG's argument on the grounds that a change to Verizon's local calling areas had far-reaching consequences and was an issue of such complexity that resolution through a two party arbitration would be inappropriate. Phase 4-B Order at 8. In contrast, the existing local calling structure established in D.P.U. 89-300 was the result of a proceeding in which all interested Parties had the opportunity to comment; any change to this structure must be deliberated in a similarly open forum. As discussed below, there has been no change in law at the Federal level that would require a reconsideration of the Department's findings in its Phase 4-B Order. Nor has GNAPs advanced any

other arguments that the Department has not considered and rejected before. GNAPs has, therefore, presented no basis upon which the Department should depart from its precedent.

In D.P.U. 89-300, the Department balanced customers' interests in having the largest local calling areas possible against the advantages of a comprehensive state structure for local calling areas that was cost-based and fair, that ensured rate continuity for customers and earnings stability for Verizon (then New England Telephone), and that protected universal service. The Department determined that a reasonable local calling area would consist of a customer's home and contiguous exchanges. D.P.U. 89-300, at 69-70.

Although GNAPs argued in its Brief that the ISP Remand Order "changed everything" regarding intercarrier compensation and the distinctions between local and toll, GNAPs did not advance, nor could the Department find, any basis on which the Department's prior conclusions regarding local calling areas was changed by the ISP Remand Order or any other FCC decision. The ISP Remand Order explicitly recognized that intrastate access regimes in place prior to the Act remain unchanged until further state commission action. ISP Remand Order at ¶39. Furthermore, the ISP Remand Order continues to recognize that calls that travel to points beyond the local exchange are access calls. Id. at ¶37. In addition, the FCC, when striking the term "local traffic" from its rules, recognized that there is a difference between a call being geographically local and merely rated as local. The FCC explicitly

recognized that the term "local" is not statutorily defined and that its use created considerable ambiguity as to whether what is being referred to is a locally rated call or a jurisdictionally local call. Id. at ¶¶ 45, 46. As such, the ISP Remand Order has no impact on the calling area structure implemented by the Department in D.P.U. 89-300.

While low-priced LATA-wide calling may be an attractive option to many consumers, it appears that GNAPs' ability to offer this service on an economical basis is contingent upon the alteration of the access regime, which is not an appropriate subject for investigation in a two-party arbitration.

For the reasons discussed above, while GNAPs is free to offer its customers whatever retail calling areas it chooses, GNAPs is required to follow Verizon's Department-established local calling areas for the purpose of intercarrier compensation. Although a call from Plymouth to Pepperell might not "feel" like a toll call to a GNAPs customer if GNAPs does not assess a separate charge for that call, the call is still a toll call for the purpose of intercarrier compensation, and GNAPs is required to pay access charges. The Department's conclusion is consistent with the FCC's holding that intrastate access regimes in place prior to the Act will continue to be enforced until altered by state commissions. See ISP Remand Order at ¶39.

On this record, we decline GNAPs' invitation to alter the existing access regime.

Turning to the specific contract language related to this issue, we find as follows. For Glossary §§ 2.34 (Extended Local Calling Scope Arrangement), 2.48

(IXC), 2.57 (Measured Internet Traffic, 2.76 (Reciprocal Compensation Traffic), 2.92 (Toll Traffic); Interconnection Attachment § § 2.2.1.1, 2.2.1.2 (Trunk Types), 7.3.3, 7.3.4 (Traffic Not Subject to Reciprocal Compensation), and 13.3 (Number Resources, Rate Center Areas and Routing Points), we find that GNAPs' proposals improperly equate local calling with flat-rated toll and would permit GNAPs to alter Verizon's local calling areas for the purpose of intercarrier compensation. Because GNAPs' proposals are in violation of Department precedent and policy with regard to the definition of local calling, Verizon's proposed language is adopted.

With regard to Glossary §2.84 (Switched Exchange Access Service), Verizon's proposed language offers a detailed description of the service. Because GNAPs did not explain why Verizon's proposed language is unreasonable, or offer descriptive language of its own, we adopt Verizon' s proposal.

We find that the provisions in Glossary §§ 2.47 (Integrated Services Digital Network), 2.56 (Main Distribution Frame), 2.77 (Retail Prices), 2.83 (Switched Access Summary Usage Data), and 2.91 (Third Party Claim); and Interconnection Attachment §7.1 (Reciprocal Compensation Traffic Interconnection Points) do not appear to be relevant to Issue 3. The Department makes no finding concerning language for these provisions. Similarly, the Department makes no finding concerning language in Interconnection Attachment § 6.2 (Traffic Measurement and Billing over Interconnection Trunks) because, despite having been referenced in

GNAPs' Petition, this provision does not appear to be in dispute.

C. Can GNAPs Assign to its Customers NXX Codes that are "Homed" in a Central Office Switch Outside of the Local Calling Area in Which the Customer Resides? (Arbitration Issue No. 4)

1. Introduction

A virtual NXX ("VNXX") is an NXX that is assigned to a central office switch outside of the customer's local calling area. VNXX service is designed to allow customers in the "virtual exchange" to place calls to the VNXX customer as if that customer had a physical presence in the virtual exchange, and the calls therefore appear local to the calling party. The Parties disagree whether Verizon's proposed language would bar GNAPs from assigning VNXX numbers to its customers, whether VNXX calls are local or toll, and whether they are subject to reciprocal compensation rules or to the access charge regime.

2. Positions of the Parties

a. GNAPs

GNAPs argues that the primary function of NXX codes is routing, not rating, and that NXX codes no longer need to be associated with any particular geographic location (GNAPs Reply Brief at 13). Consequently, GNAPs states, the use of VNXXs will allow it to offer its retail customers wide local calling areas, similar to the calling areas currently enjoyed by wireless customers (GNAPs Petition ¶ 49).

Furthermore, GNAPs argues that because of advances in telecommunications technology, particularly fiber optics transmission systems, distance is no longer a cost driver in telephone calls, and the distinction between "local" and "toll" is obsolete (Exh. GNAPs- 1, at 73; Tr. at 112). GNAPs contends that the classification of Foreign Exchange[26] ("FX") traffic as "local" or "toll" is determined according to the called and calling party's NXXs, not the physical location of the customers (Tr. at 73; GNAPs Brief at 33). GNAPs asserts that Verizon's FX service is essentially the same as the VNXX service that GNAPs proposes to offer its customers (Exh. GNAPs-1, at 69; GNAPs Petition ¶ 53). Accordingly,

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[26] Foreign Exchange service provides local telephone service from a central office which is outside (foreign to) the subscriber's exchange area. In its simplest form, a user picks up the phone in one city and gets dial tone in another city. He will also receive calls dialed to the phone in the foreign city. This means that users in the foreign city can place a local call to get the user. Newton's Telecom Dictionary (17th Edition).

GNAPs contends, because VNXX serves the same function as FX, VNXX calls must be classified as local or toll in the same manner (GNAPs Brief at 34). Additionally, GNAPs argues that ILECs sometimes offer FX service without the use of dedicated facilities, which is what GNAPs is doing: offering FX service without the use of dedicated facilities (Exh. GNAPs-1, at 78; Tr. at 76-77).

GNAPs further argues that if Verizon billed its own traffic based on the physical locations of the calling and called parties rather than by NXXs, Verizon would have to segregate its FX traffic in order to avoid billing toll charges, but it now does not do so (GNAPs Brief at 35). GNAPs argues that there is no readily available information that tells a carrier the physical location of a called or calling party, nor does there need to be, because there are no additional costs imposed when VNXX is used (Id.). GNAPs asserts that this lack of information was the basis upon which the Wireline Competition Bureau of the FCC rejected Verizon's proposal to classify calls based on the geographic end points of the call in the Virginia Order (Id. at 35-36). GNAPs contends that because VNXX traffic is not subject to the imposition of a toll charge, it is therefore local traffic subject to reciprocal compensation, and not subject to the imposition of access charges by Verizon (Id. at 32).

GNAPs also asserts that Verizon should not be allowed to impose access charges on VNXX traffic, as VNXX service does not impose any additional transport costs on Verizon or cause Verizon to lose toll revenue (GNAPs Brief at 36, 37). GNAPs asserts that GNAPs' VNXX service imposes no additional

charges on Verizon, because Verizon's work is done when it hands the call off to GNAPs at the SPOI (Id. at 47). GNAPs argues that because Verizon itself offers VNXX service to its customers, it would be discriminatory to allow Verizon to impose access charges on VNXX traffic (Id. at 38). GNAPs avers that Verizon's proposal turns the current "calling party's network pays" ("CPNP") regime "on its head" by seeking to impose access charges on VNXX calls when Verizon is already being compensated by its customers through its retail rates (Id. at 40).

Moreover, GNAPs asserts that Verizon's 500-number Internet Protocol Routing Service/Single Number Service ("IPRS/SNS")[27] is unlike Verizon's traditional FX service, in that the IPRS customer only pays Verizon transport for the distance between the IPRS "hub" and the IPRS customer (GNAPs Brief at 41). GNAPs contends that its use of VNXX service allows it to compete with Verizon's IPRS service (Exh. GNAPs 1, at 83, 105; GNAPs Brief at 42).

GNAPs further argues that it plays a major role in providing local dial-up access for Massachusetts ISPs, and if GNAPs was not permitted to offer its customers locally-rated inbound calls, through the

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[27] With IPRS service, a Verizon end-user dials a number to connect to the ISP who subscribes to the IPRS service. The call is routed through the end-user's local Verizon central office and then connected to a Verizon IPRS hub. At the IPRS hub the call is handed off to the ISP via a dedicated link separately purchased by the ISP. See Exh. GN-VZ 1-13.

use of VNXX, hundreds of thousands of residences and small businesses would lose access to dial-up internet access until their ISPs migrate to another carrier (Exh. GNAPs-1, at 68). GNAPs also argues that many of its ISP customers collocate their internet gateway equipment in GNAPs' central office buildings, and if GNAPs ceases offering VNXX service, these ISPs will have to seek another location for their equipment (Id.).

Finally, GNAPs asserts that Verizon has not provided sufficient evidence of a workable solution to show that it has surmounted the VNXX billing problems identified by the FCC in the Virginia Order (GNAPs Brief at 44).

b. Verizon

Verizon asserts that it does not object to GNAPs assigning VNXX numbers to its customers (Tr. at 131-132). Rather, Verizon states that it objects to the goals of GNAPs' proposed VNXX service, which are to: 1) require Verizon to pay GNAPs reciprocal compensation for interexchange calls; and 2) deprive Verizon of the access charges it is entitled to for such toll calls (Verizon Response ¶ 67).

Contrary to GNAPs' contentions, Verizon argues that NXXs continue to serve both a routing and a rating purpose within the industry, as each NXX is assigned to a switch for routing and a rate center for rating purposes (Id. ¶¶ 68-70). Verizon avers that GNAPs' proposed VNXX service is a substitute toll-free calling service which enables a Verizon customer

to call a GNAPs VNXX customer without paying a toll charge, as if GNAPs had assigned its customer an 800 number (Verizon Brief at 41). Verizon argues that this expands a Verizon customer's local calling area without compensating Verizon for transport outside of its local calling area (Id.). Verizon asserts that local calling areas are defined by localities and exchanges, not by NXXs, and that the FCC confirmed that number assignment does not control intercarrier compensation (Id. at 42 n. 123, 43).

Verizon also disputes GNAPs' claim that VNXX is the same as Verizon's FX service (Verizon Response ¶ 92). Verizon asserts that when it offers FX, the FX customer pays Verizon for transporting the FX customer's calls from the foreign exchange where the NXX is "homed" to the FX customer's location (Exh. VZ-2, at 42; Verizon Response ¶ 92). Verizon further asserts that, with FX service, the FX customer has a dedicated line from the foreign exchange to their physical location, and if the FX customer wants to have FX service from more than one rate center within a LATA, the FX customer is required to pay Verizon higher monthly charges in order to compensate Verizon for transport from additional rate centers (Exh. VZ-2, at 43; Verizon Response ¶ 93). Verizon argues that its FX offering merely shifts payment responsibility from one user to another as a convenience to the called party (Exh. VZ-2, at 26; Verizon Brief at 45).

However, Verizon argues, under GNAPs' proposed VNXX offering, GNAPs expects Verizon to provide transport for free, and to pay reciprocal compensation to GNAPs (Verizon Response ¶ 92).

Verizon argues that unlike FX, where Verizon is compensated by the called party for the service, GNAPs' VNXX service would provide GNAPs with all of the compensation while requiring Verizon to provide transport for free (Verizon Brief at 45).

Verizon also argues that GNAPs' VNXX service is not analogous to Verizon's IPRS service, because its IPRS service includes a charge for transport (Tr. at 135). In addition, Verizon states that it deploys hubs as close as geographically possible to concentrations of calling parties, and that more than 80 percent of the IPRS traffic is terminated at the hubs on a local basis (Id.). Verizon asserts that GNAPs is attempting to use Verizon's network to provide toll-free interexchange calling to Verizon customers and then charge Verizon for that privilege (Verizon Brief at 44).

Moreover, Verizon argues that, contrary to GNAPs' assertion, VNXX does not represent state of the art technology, because carriers have been offering toll-free service for decades, and there is nothing in GNAPs' VNXX proposal that can be considered new from a technological perspective (Exh. VZ-2, at 33). Verizon asserts that the vast majority of states that have considered GNAPs' VNXX proposal have rejected it, including Ohio, Illinois, California, Florida, Pennsylvania, Texas, South Carolina, Tennessee, Connecticut, Georgia, Maine, Missouri, and Nevada (Verizon Brief at 46).

Finally, Verizon claims it has developed a plan for the proper rating of VNXX calls. Specifically, Verizon states that the plan would require a CLEC to either submit a list of VNXX numbers to Verizon, or

conduct a billing study which would allow Verizon to estimate the amount of traffic being delivered to CLEC VNXX numbers (Exh. VZ-2, at 41; Tr. at 166-167). Therefore, Verizon urges the Department to adopt Verizon's proposed contract language.

3. Analysis and Findings

This issue, like issue 3, turns on the distinction between "local" and "toll." Because Verizon does not dispute GNAPs' ability to assign NXXs as it chooses, the question of whether GNAPs may assign to its customers VNXXs "homed" in rate centers outside of the local calling area where the customer resides is not before us. GNAPs did not identify, nor could the Department find, any proposed language which would explicitly bar GNAPs from offering VNXX. Rather, the issue before the Department is similar to Issue 3, namely, whether GNAPs' VNXX service is properly considered local or toll, and whether it is subject to reciprocal compensation rules, or to the existing access regime. For the reasons discussed below, we find that VNXX calls will be rated as local or toll based on the geographic end points of the call.

First, although GNAPs testified at the hearing that Verizon's Tariff No. 10[28] contains a list of NXXs which define local calling areas, GNAPs did not provide this list as part of its Exhibit 3, nor does the

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[28] Tariff No. 10 contains the terms, conditions and rates at which Verizon offers exchange and network services.

Department find such a list in Tariff No. 10. Tariff No. 10 does contain, however, a list of the exchanges and municipalities that make up the local calling area for each Massachusetts exchange.[29] Verizon's Tariff No. 10 defines local calling areas in terms of municipalities and geographic areas, not in terms of NXXs. GNAPs' proposal, however, by assigning non-geographic NXXs, would make intraLATA toll calls originated by Verizon customers appear as local calls to both the calling party and the Verizon switch, depriving Verizon of toll charges for which it has an approved tariff, and enabling GNAPs to claim entitlement to reciprocal compensation for having terminated what is actually a toll call.

Second, GNAPs' argument that its proposed VNXX service is indistinguishable from Verizon's FX service, and therefore entitled to the same treatment, is unpersuasive. Verizon's FX service uses dedicated facilities to transport FX traffic to the FX customer's location, and the FX customer pays Verizon for the cost of transporting that traffic (Exh. VZ-2, at 42). Thus, the cost of FX service to the FX customer grows more expensive as the customer elects to receive calls from additional foreign exchanges. FX service does not alter the traditional definitions of local and toll, it merely shifts responsibility for paying the toll charge to the called party (Id. at 26). Although GNAPs argued that ILECs in other states offer FX service without the use of dedicated facilities, GNAPs

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[29] Tariff No. 10, Part A, Section 6.1.

provided no evidence that Verizon offers FX service without the use of dedicated facilities in Massachusetts. Record evidence points exclusively the other way (Id. at 42). Nor did GNAPs provide evidence that ILECs offering FX service without the use of dedicated facilities were not compensated for transporting the traffic to the FX customer. Accordingly, we give little weight to GNAPs' assertions on this point.

Similarly, GNAPs' VNXX service is readily distinguishable from Verizon's IPRS service. With IPRS, calls are routed to a hub, and the IPRS customer pays Verizon for transport from the hub to its location. Because Verizon only receives compensation for transporting traffic from the hub, it has an economic incentive to build as many hubs as possible, as close to the IPRS customer's calling parties as possible, which Verizon has indeed done. More precisely, 80 percent of IPRS traffic is local when it terminates at the hub (Tr. at 135).

Third, Verizon has proposed a solution to the billing of VNXX calls, which had not been considered by the Wireline Competition Bureau of the FCC (Id. at 168-169). Verizon's proposed solution provides alternative methods by which carriers might work collaboratively to determine the geographic end points of a call, thus properly rating VNXX calls as local or toll. The Department finds that Verizon's proposed plan for rating VNXX calls as local or toll is responsive to the billing concerns raised by the

Wireline Competition Bureau in the Virginia Order.[30] While the Department anticipates that it may eventually be called upon to help the Parties work out some of the details in Verizon's proposed plan for properly rating VNXX calls, an initial difficulty in implementation is not sufficient reason to forfeit any hope of the eventual proper rating of these calls. Indeed, when a carrier seeks to offer a service that complicates enforcement of the existing access regime, it is appropriate to require that carrier to work cooperatively with other carriers involved to ensure that the other carriers are duly compensated for their roles in carrying the traffic generated as a result of that service. To do otherwise would be to permit a de facto alteration of Verizon's local calling areas, which the Department has already determined to be an inappropriate topic for a two-party arbitration.

We find Verizon's proposal to be an acceptable starting point to develop the cooperative billing process necessary to properly rate VNXX calls. Accordingly, we direct the Parties to submit, as part of the compliance filing, contract language that incorporates one or both of Verizon's proposed solutions.

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[30] As noted, supra, because the FCC's Wireline Competition Bureau was standing in the place of the Virginia Commission in issuing the Virginia Order, the Virginia Order is persuasive authority, but is not binding on the Department.

In the Department's discussion of Verizon's local calling areas, supra, the Department rejected GNAPs' attempt to change Verizon's wholesale local calling areas as inappropriate for resolution in a two-party arbitration. GNAPs' VNXX proposal is even more ambitious, in that it would change both Verizon's wholesale and retail calling areas. The Department will not make such significant changes in a two-party arbitration. If GNAPs cannot ensure that all LECs, including Verizon,[31] have access to the geographic end point data necessary to properly rate a call as local or toll, and are properly compensated, then GNAPs cannot provide virtual NXX service to its customers.

GNAPs indicated that it serves a large number of Massachusetts ISPs through VNXX, and indicated further that GNAPs will have to stop serving these ISPs if GNAPs is prevented from offering locally-rated inbound calling via VNXX. If so, it appears that GNAPs' ability to serve ISPs is the result of merely shifting transport costs to other LECs and of billing reciprocal compensation for completing calls that are properly rated as toll. Unlike Verizon's IPRS service, where Verizon has an economic incentive to deploy as many new facilities as possible, GNAPs' VNXX would artificially shield GNAPs from the true cost of offering the service and will give GNAPs an economic incentive to deploy as few new facilities as possible.

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[31] Verizon no longer has a monopoly on the residential market, thus Verizon is unlikely to be the only carrier whose customers call GNAPs' VNXX numbers.

By artificially reducing the cost of offering the service, GNAPs will be able to offer an artificially low price to ISPs and other customers who experience heavy inbound calling. The VNXX customers will be able to offer an artificially low price to their calling party subscribers, thus sending inaccurate cost signals to the calling parties concerning the true cost of the service. The result would be a considerable market distortion based on an implicit Verizon subsidy of GNAPs' operations. While this decision may frustrate GNAPs' ability to offer VNXX under the same financial terms which it may to this point have enjoyed, this decision does not explicitly bar GNAPs from offering VNXX service.

Although the Wireline Competition Bureau approved a VNXX proposal similar to GNAPs' proposal, this approval was based upon the narrow ground that there was no technically feasible manner of determining the geographic end points of a call, and therefore no alternative but to rate calls according to the originating and terminating NXXs. Virginia Order at ¶¶301-302. As discussed above, Verizon has proposed alternative methods for determining the geographic end points of calls, and the Department finds that Verizon's proposal is responsive to the concerns raised in and consistent with the Virginia Order.

Turning to the contract language in dispute, we find that Glossary §§ 2.71 (Purchasing Party) and 2.77 (Retail Prices), referenced in GNAPs' Petition,

are not relevant to Issue 4.[32] Accordingly, the Department makes no finding concerning language for these provisions. As to Glossary §§ 2.72 (Rate Center Area), 2.73 (Rate Center Point), and 2.76 (Reciprocal Compensation Traffic); and Interconnection Attachment § 13 (Number Resources, Rate Center Areas and Routing Points), we find that Verizon's contract language is in keeping with the Federal and Department policy concerning the distinctions between local and toll and the operation of the access regime. Accordingly, consistent with the discussion above, Verizon's proposed language is adopted.

D. Should the Agreement Include Language that Expressly Requires the Parties to Renegotiate Reciprocal Compensation Obligations if Current Law is Overturned or Otherwise Revised? (Arbitration Issue No. 5)

1. Introduction

GNAPs seeks an express and specific change of law provision concerning reciprocal compensation, in the event of a future reversal or modification to the

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[32] We believe GNAPs incorrectly identified these contract sections.

FCC's ISP Remand Order. Verizon contends that its standard change-in-law language provides for such a contingency.

2. Positions of the Parties

a. GNAPs

GNAPs argues that Verizon's proposed contract language, which acknowledges GNAPs' right to renegotiate reciprocal compensation obligations if the current law is overturned or otherwise revised, is inadequate because it "does not directly pertain to the ISP Remand Order as the Interconnection Agreement does not deal with compensation for ISP bound traffic" (GNAPs Brief at 54). According to GNAPs, the ISP Remand Order deserves "special attention" because it is currently being revisited by the FCC and its outcome is uncertain (Id.). GNAPs does not provide explicit contract language on this issue, but instead requests a policy determination from the Department (Id. at 53).

b. Verizon

Verizon argues that the agreed upon change-in-law provisions contained in General Terms and Conditions §§ 4.5 and 4.6 "squarely address any future reversal or modification to the ISP Remand Order and, thus, there is no need for a specific niche provision that would address the ISP Remand Order"

(Verizon Brief at 57). Moreover, Verizon states that GNAPs' counsel conceded this point during the arbitration hearing (Id., citing Tr. at 179).

3. Analysis and Findings

GNAPs and Verizon appear to agree that a judicial reversal or modification of the ISP Remand Order may require renegotiation of the affected provisions of their interconnection agreement. At issue is whether the ISP Remand Order deserves "special attention" above-and-beyond Verizon's standard change-in-law language. As noted by Verizon, in response to a question from the Department, GNAPs' counsel conceded that specific focus on the ISP Remand Order was not necessary when he stated that "[i]n other states where we have not prevailed on this issue for one reason or another, we are of the opinion that Verizon's language will still enable us to enforce Federal law in terms of the arbitrated contract" (Tr. at 179). Accordingly, the Department finds GNAPs' proposal to include an express and specific change-in-law provision concerning reciprocal compensation, in the event of a future reversal or modification to the FCC's ISP Remand Order, unnecessary.[33] We find that the non-disputed change-in-law language contained in General Terms and Conditions §§ 4.5 and 4.6 is

[33] We note that this finding is consistent with the Virginia Order. See Virginia Order at ¶¶ 251, 254.

sufficient to address any future reversal or modification of the ISP Remand Order.

Turning to the contract language in dispute, we find as follows.[34] First, GNAPs cites to Glossary §§ 2.42 (Inside Wire or Inside Wiring) and 2.56 (Main Distribution Frame), and Interconnection Attachment § 6. 1. 1, as related to Issue 5, but these sections do not relate to Issue 5. Nor do they contain any disputed contract language. Accordingly, there is no need to render a decision on these sections.

Second, GNAPs fails to adequately support its proposed language in Glossary §§ 2.43, 2.74, and 2.75, Additional Services Attachment § 5.1, and Interconnection Attachment §§ 7.3.3 and 7.3.4. Consequently, we adopt Verizon's language. We note that, with respect to Glossary § 2.75 (Reciprocal Compensation), we find Verizon's proposed definition more complete.

Third, we adopt Verizon's proposed language in Interconnection Attachment § 7.4. We find that it is consistent with 47 C. F. R. § 51.711, which provides for symmetrical reciprocal compensation.

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[34] GNAPs also references Glossary §§ 2.57 (Measured Internet Traffic), 2.76 (Reciprocal Compensation Traffic), and 2.92 (Toll Traffic) as related to Arbitration Issue No. 5. We addressed the disputed language in these sections in our discussion of Arbitration Issue No. 3, supra, where we adopted Verizon's proposals.

E. Whether Two-Way Trunking Should Be Available to GNAPs at GNAPs' Request? (Arbitration Issue No. 6)

1. Introduction

GNAPs seeks authority to request Verizon to provide two-way trunking at GNAPs' sole discretion. Verizon claims that operational issues for Verizon's network mandate mutual accord between the Parties as to the operational and engineering aspects of the two-way trunks between them.

2. Positions of the Parties

a. GNAPs

GNAPs contends that there are now, and will likely be in the future, disagreements between Verizon and GNAPs over the operational responsibilities and design parameters associated with two-way trunks (GNAPs Brief at 58). GNAPs claims that these disagreements result from the "onerous restrictions imposed by Verizon's proposed contract language upon Global's ability to order trunking facilities" (Id.). For example, GNAPs argues that Verizon's proposal for GNAPs to forecast its traffic terminating on Verizon's network and Verizon's traffic terminating on GNAPs' network is "discriminatory and burdensome" (Id.).

GNAPs instead proposes that each party forecast the traffic that it expects will terminate on the other carrier's network (GNAPs Brief at 58, citing Petition, Exh. B, Glossary §§ 2.93- 95; Interconnection Attachment §§ 2.2-2.4, 5, 6, 9). GNAPs further proposes modifications which: (1) exclude measured Internet traffic; (2) replace "intrastate traffic" with "other traffic"; (3) remove restrictions on the manner of connection; (4) impose industry standards for equipment used in provisioning; (5) assure equality in service quality and provisioning through the ASR process; (6) equalize trunk underutilization restrictions; (7) eliminate asymmetrical upfront payment requirements over and above what would actually be due; (8) eliminate restrictive subtending arrangement requirements; and, (9) clarify the definition of "traffic rate" (Id. at 58-59). According to GNAPs, "[t]hese proposed modifications are necessary and in totality provide for a more equitable offering of two-way trunking than those proposed by Verizon" (Id. at 59) (footnote omitted).

b. Verizon

Verizon agrees that GNAPs has the option to decide whether it wants to use one-way or two-way trunks for interconnection, pursuant to 47 C.F.R. § 51.305(f) (Verizon Brief at 72). However, Verizon states that because two-way trunks present operational issues for Verizon's own network, "the parties must come to an understanding about the operational and engineering aspects of the two-way trunks between them" (Id.). In the hearing in

response to a question from the Department, Verizon summarized its position on this issue:

> Again, Verizon's position is, you know, we don't have a problem with two-way trunks. It's just you need to lay some ground rules. And it could impact the integrity of [Verizon's] network because of sizing, blocking, utilization, stuff like that. We haven't had a problem with other CLECs agreeing to these terms, and actually it's worked out where traffic is flowing in both directions. (Tr. at 186-187). According to Verizon, GNAPs' proposed contract language on this issue presents operational and technical problems for Verizon (Verizon Brief at 72).

3. Analysis and Findings

Pursuant to FCC rules, GNAPs' has the option to elect two way-trunking if two-way trunking is technically feasible. See Local Competition Order at ¶ 219; 47 C.F.R. § 51.305(f). But, the issue for the Department's resolution in this proceeding is whether GNAPs may dictate all operational and engineering aspects of the two-way trunks. The Department agrees with Verizon that two-way trunking presents operational and technical problems for Verizon's own network, and consequently, the Department must take into consideration Verizon's right, as "owner and manager of its network," to maintain its network integrity. See Tariff No. 17 Order at 148. The Department therefore rejects GNAPs' proposal for sole discretion over the operational responsibilities

and design parameters of two-way trunks between the Parties. Accordingly, the Department adopts Verizon's proposed language for Interconnection Attachment § 2.4.2. Because two-way trunks affect operational issues of Verizon's network, the Department finds it reasonable for the Parties to mutually agree on the initial number of two-way trunks that the Parties will use.[35] Additionally, we adopt Verizon's proposal in Interconnection Attachment §2.4.12 where Verizon would be able to disconnect trunks that are operating under 60 percent utilization. The Department finds this language appropriate for Verizon to maintain its network integrity and manage its network efficiently.

With respect to other disputed contract language, we find as follows. First, GNAPs fails to support its proposed language for Glossary §§ 2.94-2.95,[36] and

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[35] We also adopt Verizon's proposed language concerning one-way interconnections trunks in Interconnection Attachment §§ 2.2.3, 2.3.1 and 2.3.1.1. Furthermore, we find that Verizon's proposed language in § 2.3.1 specifies the terms and conditions for traffic from GNAPs to Verizon. GNAPs proposes language that references traffic exchanged in both directions (i.e., from GNAPs to Verizon and from Verizon to GNAPs), which not only confuses the issue because one-way interconnection trunks are by definition for traffic in one direction, but also is unnecessary considering that § 2.3.2, which is undisputed, outlines the terms and conditions for traffic from Verizon to GNAPs.

[36] GNAPs cites to Glossary §§ 2.93-2.95 as related sections to the issue of two-way trunking. Section 2.93 is entitled "Toxic or Hazardous Substance" and both Parties agree on the contract language for this section. The Department therefore assumes that GNAPs intended to reference §§ 2.94-2.96.

Interconnection Attachment § 2.4.14. Sections 2.94-2.95 establish rating and billing parameters for interconnection trunks, which the Department finds appropriate for this interconnection agreement. For Interconnection Attachment § 2.4.14, GNAPs fails to support why it should be entitled to an expedited period for replacing two-way interconnection trunk groups with one-way interconnection trunk groups, or even if such an expedited process is technically feasible or commercially viable. The Department finds that Verizon's proposed language for Glossary §§ 2.94 and 2.95, and Interconnection Attachment § 2.4.14 is reasonable and adopts it accordingly.

Second, Verizon claims that it does not understand what GNAPs is intending to accomplish with its edits to the definition of "Trunk Side" in Glossary § 2.96 (See Verizon Brief at 81). GNAPs has not explained its proposed changes. Accordingly, the Department finds that GNAPs has not properly presented and supported its proposal and hereby adopts Verizon's proposed language in § 2.96. We find Verizon's definition is clearer and more detailed than GNAPs' proposed definition.

Third, GNAPs also fails to explain why its proposed language in Interconnection Attachment §§ 2.2.4 and 2.4.11 is necessary or appropriate. The Department finds GNAPs' language in Interconnection Attachment §§ 2.2.4 and 2.4.11, especially in regards to "originating Party" and/or "terminating Party," confusing and unclear. We also agree with Verizon that the addition of the term "originating party" is "nonsensical" considering that both Parties originate traffic over two-way trunks

(See Verizon Brief at 79). In contrast, Verizon's proposed language is consistent with Department precedent on an ILEC's right to manage its network, as discussed above. Additionally, the Department further finds it reasonable for GNAPs to bear the responsibility to submit an Access Service Request ("ASR") to augment a trunk as proposed by Verizon in Interconnection Attachment § 2.2.4. Accordingly, we find Verizon's proposal reasonable and therefore adopt Verizon's proposed language.

Fourth, Verizon offers no compelling reason why language requiring Verizon to "reasonably accept ASRs submitted by GNAPs" is unnecessary or undesirable. GNAPs' proposal simply provides GNAPs with assurances that its ASRs will not be unreasonably denied. Accordingly, we find GNAPs' proposal reasonable and adopt GNAPs' proposed language in Interconnection Attachment § 2.4.10.

Fifth, we also adopt GNAPs' proposed language in Interconnection Attachment §§2.4.3 and 2.4.6. The Department finds it reasonable to specify in §2.4.6 that the equipment be required only "where technically feasible." Regarding Interconnection Attachment §2.4.3, as discussed above in relation to Arbitration Issue Nos. 1 and 2, and in accordance with Department precedent, GNAPs has the right to designate its POI at its own discretion.

Sixth, because GNAPs customers are primarily ISPs, the majority of traffic between GNAPs and Verizon originates on Verizon's network and terminates on GNAPs' network. Thus, the Department finds that GNAPs is in a better position to forecast trunk requirements for traffic originating

and terminating on GNAPs' network. Accordingly, the Department adopts Verizon's language for Interconnection Attachment § 2.4.4.

Seventh, we see no reason to exempt Verizon from performance standards in connection with two-way interconnection trunks as Verizon has proposed in Interconnection Attachment § 2.4.13. Nor has Verizon provided any reason for us to do so. We understand that implementation of two-way trunking is not entirely within Verizon's control, however, we find that Verizon's proposal to exempt itself from meeting performance standards in connection with two-way trunks goes too far, and that more reasonable alternatives exist to address any lack of control. For instance, a "stopped clock" approach may be utilized for CLEC-caused delays in provisioning. Accordingly, §2.4.13 should be stricken in its entirety, as GNAPs has proposed.

Eighth, we adopt Verizon's proposed Interconnection Attachment §2.4.16. The term "Proportional Percentage of Use" ("PPU") is a billing factor that addresses the traffic flow, and its use as a billing factor is the most equitable way to apportion expenses when actual traffic data is available. But, the PPU cannot be determined in the absence of actual usage data, e.g. for the first billing cycle after a two-way trunk is established. Verizon's proposal to apportion expenses equally when actual usage data is absent is fair, and we adopt it. Moreover, Verizon's proposal is standard language for interconnection agreements in Massachusetts and other states (See Tr. at 184). Accordingly, the Department finds Verizon's proposed language for recurring charges in

Interconnection Attachment §2.4.16 is reasonable.

The Department, however, rejects Verizon's proposed language for nonrecurring charges in Interconnection Attachment §2.4.16. Verizon is a co-user of, and benefits from, the entire facility on which the two-way trunk rides. Accordingly, we find GNAPs' proposal to apportion nonrecurring charges equally for the entire facility on which the two-way trunk rides is appropriate. We adopt GNAPs' proposed language regarding nonrecurring charges in Interconnection Attachment §2.4.16.

Finally, we adopt Verizon's proposed Interconnection Attachment §9.2 (Access Toll Connecting Trunk Group Architecture). GNAPs has failed to support or explain its proposed changes. We agree with Verizon that GNAPs' proposal appears to violate routing and tandem subtending arrangements in the Local Exchange Routing Guide.

F. Is it Appropriate to Incorporate by Reference Other Documents, Including Tariffs, into the Agreement Instead of Fully Setting out Those Provisions in the Agreement? (Arbitration Issue No. 7)

1. Introduction

GNAPs opposes Verizon's incorporation by reference of other documents such as tariff rates, terms and conditions, and the CLEC Handbook, into the interconnection agreement. GNAPs argues that it

is inappropriate to incorporate by reference other documents instead of fully setting out those provisions in the agreement.

2. Positions of the Parties

a. GNAPs

GNAPs maintains that the interconnection agreement should be the sole determinant of the rights and obligations of the Parties, yet GNAPs states that Verizon's proposal contains numerous citations and references to tariffs and other documents, such as the CLEC Handbook, which would, in effect, permit Verizon to change the terms and conditions of the interconnection agreement without GNAPs' assent (GNAPs Brief at 59). As a result, GNAPs claims, it would have no certainty over the very terms it has negotiated or arbitrated (GNAPs Petition ¶ 62).

In response to Verizon's argument that tariff filings are public documents which GNAPs has the right to contest, GNAPs contends that Verizon "misses the point" for several reasons (GNAPs Brief at 60). First, GNAPs asserts that a contract evidences a meeting of the minds and should not change because Verizon "decides it should" (Id.). Second, GNAPs states that to become aware of a tariff filing would require it to investigate daily each and every tariff filing to determine the potential impact on its interconnection agreement (Id.). Third, GNAPs argues that it would incur additional expenses over

and above those related to the negotiation and arbitration of the contract (Id.). Fourth, GNAPs notes that the CLEC Handbook is subject neither to Department review or approval (GNAPs Reply at 24).

Moreover, GNAPs contends that Verizon paints GNAPs proposal as an attempt to engage in regulatory arbitrage, but its proposal actually attempts to constrain Verizon from engaging in regulatory arbitrage by defeating contract language (Id.). GNAPs explains that, although Verizon contends that GNAPs seeks to enjoy the lower of its interconnection prices or more recently determined prices set by the Department, if and when prices actually change due to a Department determination, this change constitutes a "change of law" which could be implemented pursuant to operation of that provision in the contract (Id., citing §§ 4.5 and 4.6 of the General Terms and Conditions).

Lastly, GNAPs contends that because Verizon's references to its tariff and other documents are pervasive in the interconnection agreement, it has not proposed specific contract language related to this issue, but rather asks the Department to render a policy ruling that the interconnection agreement should be self-contained (GNAPs Reply at 23). Specifically, GNAPs urges the Department not to permit tariffs to supersede interconnection agreement rates, terms or conditions (GNAPs Brief at 60). Additionally, GNAPs requests that the Department permit Verizon to cross reference its tariffs solely for the purpose of utilizing its tariffed rates for UNEs and collocation (GNAPs Petition ¶ 63). GNAPs further requests that definitions

contained in Verizon tariffs should not prevail over definitions within the Parties' interconnection agreement, and that "Tariff" should be defined so as to exclude incorporation of future tariffs (GNAPs Brief at 60-61).

GNAPs indicates that references to other documents occur throughout the agreement including in the following sections: General Terms and Conditions §1; Interconnection Attachment §§ 1, 8, 9, and 10.6; Network Elements Attachment §§ 1.1, 1.3, 4.3, 4.4.6, 6.2 and throughout contract; and the Pricing Attachment (GNAPs Petition ¶ 64).

b. Verizon

Verizon maintains that tariff terms and conditions only supplement the terms and conditions of the interconnection agreement (Verizon Brief at 83). More specifically, Verizon explains that, under proposed General Terms and Condition § 1.2, the Parties would rely on the appropriate Verizon tariff for applicable rates; but, when there is a conflict between the tariff and the interconnection agreement, the interconnection agreement's terms and conditions supersede terms and conditions contained in the tariff (Id.). Accordingly, Verizon asserts its proposed language is consistent with the Department's policy that interconnection agreement provisions control unless the Parties agree otherwise (Id. 83-84, citing Tariff No. 17 Order).

With regard to prices, Verizon notes that the Parties agreed that applicable tariffs are the first

source of prices for services under the agreement (Verizon Brief at 84). Despite this agreement, Verizon asserts that GNAPs' contract modifications freeze current tariff prices and create an arbitrage opportunity that could render the tariff process moot (Id.). Verizon insists, on the other hand, that its proposal ensures that prices are set and updated in a manner that complies with Department guidelines, and is also efficient, consistent, fair and nondiscriminatory (Id.). In fact, Verizon states, Verizon's proposal would conserve Department resources by relying on Department-approved prices and rates (Id.).

Moreover, Verizon notes that the tariff process is not unilateral, and that, because Verizon's proposal gives precedence to the terms and conditions of the interconnection agreement, GNAPs would not be compelled to review the details of each tariff filing (Id. at 85-86). Additionally, Verizon points out that the Illinois, New York, and Ohio Commissions, and the Rhode Island arbitrator, agreed with Verizon's position (Verizon Brief at 86).

Finally, Verizon argues that GNAPs' broad challenge to the appropriateness of referencing tariffs in the interconnection agreement does not apply to many of the contract sections in which GNAPs has deleted tariff references, some of which GNAPs neglects to list. Furthermore, Verizon contends that GNAPs' failure to address each section leaves many proposed contract changes unsupported (Verizon Brief at 88). Accordingly, Verizon urges the Department to reject GNAPs' proposed changes (Id.).

3. Analysis and Findings

As a matter of policy, the Department does not oppose the incorporation of documents, including tariffs, by sufficiently specific reference. In particular, we find cross-referencing Verizon tariffs for prices to be reasonable, a practice which GNAPs did not oppose in its Petition (See GNAPs Petition ¶63). Moreover, we do not find that GNAPs' concerns about the tariff process persuade us otherwise. As Verizon notes, the tariff process is not unilateral and GNAPs may always participate in the tariff process to protect its interests. In fact, Verizon is obligated to provide electronic notification of proposed tariff changes to all CLECs with whom it has resale and interconnection agreements. Tariff No. 17 Order at 22-23.[37] This notice is provided on or about the same day that the proposed tariff changes are filed with the Department. Id. Thus, daily investigation by a CLEC is not necessary.[38] Additionally, we find that costs incurred in order to monitor new tariff filings to be part of a CLEC's normal cost of doing business. Accordingly, we reject GNAPs' request to define

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[37] Tariff No. 17 contains the Department-approved rates, terms and conditions that Verizon offers for interconnection and access to network elements.

[38] Furthermore, we note that of the 38 tariffs filed in Massachusetts from July 1 to October 15, 2002, none of the tariffs contained substantive changes to services or rates that would impact any interconnection agreement between Verizon and GNAPs (See RR-DTE-6).

"tariff" to preclude future tariffs, which could, in effect, "freeze" prices in the interconnection agreement by limiting the reference to tariffs in effect on the day of a contract's execution. Accordingly, we approve Verizon's proposed language in its Pricing Attachment, as well as Network Element Attachment §§ 1.8 and 4.3.

As for references to documents other than tariffs, we find as a general matter that references to other such documents to be reasonable, even though modifications to these documents may not be reviewed or approved by the Department. To begin, we note that GNAPs has not actually identified any objectionable document reference in the Agreement, other than to tariff references, for our review. In addition, we find that the purpose of documents such as the CLEC Handbook are to facilitate the business relationship between Verizon and a CLEC, and thus, the potential is small for the CLEC Handbook to materially affect the terms and conditions of the interconnection agreement in a way adverse to CLECs.

As to tariff terms and conditions superseding terms and conditions in the interconnection agreement, we previously determined that tariffs generally do not supersede negotiated or arbitrated terms. Tariff No. 17 Order at 19. Thus, our Tariff No. 17 Order already provides for that which GNAPs requests. Moreover, we find Verizon's proposed General Terms and Conditions §§ 1.1 and 1.2 to be more consistent with our policy, and approve these sections accordingly.

On the other hand, we are not necessarily opposed to GNAPs' suggestion to incorporate specific provisions of tariffs, or other documents, into the interconnection agreement directly.[39] But, GNAPs' failure to identify specifically which provisions it seeks to have incorporated in full from the tariff or other document, and the basis for incorporating that provision, prevents us from properly considering this approach. GNAPs may negotiate for insertion of specific provisions contained in documents, including tariffs or the CLEC Handbook, into the interconnection agreement, but we will dismiss any request for the insertion of specific language from other documents into the interconnection agreement which conflicts with any of the findings made in this order, unless agreed to, in whole, by both Parties.

Finally, in response to RR-DTE-7, Verizon states that if the Parties explicitly agree that an applicable tariff controls the terms of the offering, then "where an applicable tariff is incorporated by reference into an interconnection agreement, and the specific provision in the tariff was not provided in the interconnection agreement, the tariff provision would control since it was clearly the intention of the

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[39] Usually, rehearsal, in the body of a contract, of wording found in other, separate documents is unnecessary, for a contract "writing may incorporate other documents by reference and may indicate a method by which to determine the unstated terms that were actually agreed upon." Corbin on Contracts, § 95, n. 12. But, the parties are free to incorporate specific provisions if they so choose.

Parties to incorporate the tariff." We address this below.

In our Tariff No. 17 Order, at 18, we stated that the "Act encourages carriers to fashion agreements through negotiation and arbitration that may have differing provisions between the same incumbent and different CLECs, so that each contract reflects the individual business strategies and priorities of that CLEC." We therefore held that "[t]ariff provisions will be applicable to interconnection agreements only where the parties to the agreement have explicitly provided in the agreement that an applicable tariff shall control the terms of the offering." Id. at 19. Additionally, we stated that "the terms and conditions of Tariff No. 17 represent a supplement to interconnection agreements from which carriers may choose to purchase services not addressed in their interconnection agreements." Id. at 21.

Consequently, we find that incorporation of additional terms and conditions from other documents by mere reference to the document is inconsistent with the policy we set forth in our Tariff No. 17 Order unless the Parties explicitly intend to incorporate each and every additional term by the reference. By "additional," we mean terms and conditions in the tariff, or other document, which are not inconsistent with the terms and conditions in the interconnection agreement, and for which there may, or may not, be a corresponding provision contained in the interconnection agreement. Permitting Verizon to impose all such terms and conditions from documents incorporated by reference without the explicit assent of the CLEC would allow Verizon to achieve a level of

conformity in its agreement with different CLECs that would be inconsistent with our, and the Act's, preference for contracts that reflect the individual business strategies and priorities of each CLEC. Accordingly, we conclude that, where the Parties explicitly provide that an applicable tariff, or document, controls the terms and conditions of an offering, the agreement shall make clear that the Parties explicitly agree that all provisions in the tariff, or other document, which are not inconsistent with provisions in the interconnection agreement, or that are not addressed at all in the interconnection agreement, are also controlling.

In conclusion, we note that we do not directly address each and every provision in the interconnection agreement which contains a document or tariff reference; however, we expect that our findings above will allow the Parties to submit conforming contract language for all such provisions in the agreement.

G. Should the Interconnection Agreement Require GNAPs To Obtain Excess Liability Insurance Coverage of $10 Million and Require GNAPs to Adopt Specified Policy Forms? (Arbitration Issue No. 8)

1. Introduction

Verizon's proposed insurance requirements include the following: Commercial General Liability

of $2 million; Excess Umbrella Liability of $10 million; Worker's Compensation of $2 million; and Commercial Motor Vehicle Insurance of $2 million. GNAPs proposes to reduce the limits to $1 million for the first three items, and to delete the requirement for Commercial Motor Vehicle Insurance. GNAPs also believes the precise form of insurance should be left to GNAPs' discretion, and that it should be permitted to substitute an umbrella excess liability policy for the minimum limits (GNAPs Petition ¶ 67).

Additionally, Verizon's proposal requires GNAPs to reimburse Verizon for the cost of insurance if GNAPs' contractors' do not maintain insurance, but GNAPs proposes to make this obligation reciprocal (GNAPs Brief at 61). Finally, GNAPs proposes to delete Verizon's requirement that all real and personal property located on Verizon's premises be insured on a full replacement cost basis (Id.).

2. Positions of the Parties

a. GNAPs

GNAPs argues that Verizon's proposal is burdensome. First, GNAPs notes that PacBell, a similarly situated ILEC, considered GNAPs' current commercial general liability insurance coverage of $1 million with $10 million in excess liability coverage sufficient; therefore, GNAPs questions why Verizon does not find its proposal acceptable (GNAPs Brief at 62-63). Additionally, given that SBC has agreed to lower insurance levels, GNAPs contends that Verizon

is obligated to provide just cause why its insurance requirements are reasonable, a burden that Global alleges Verizon fails (GNAPs Reply at 24). Second, GNAPs states Verizon has not indicated any circumstance which has resulted in damages or injuries in excess of this amount committed by any CLEC, and insists that its current insurance coverage is adequate to cover any damages that may occur from GNAPs' operation (Exh. GNAPs-2, at 6; GNAPs Brief at 63). Indeed, says GNAPs, because GNAPs and Verizon interconnect at end point fiber meets, there is little risk of destruction to Verizon property and facilities (GNAPs Reply at 25). Third, GNAPs claims that Verizon's proposed automobile insurance requirement duplicates existing state requirements and is excessive, and, therefore, should be deleted (Exh. GNAPs-2, at 6; GNAPs Petition ¶ 66). Fourth, GNAPs argues that limits imposed on other CLECs in other proceedings before the Department should serve as a cap (Exh. GNAPs-2, at 7). Finally, GNAPs believes the precise form of insurance should be left to GNAPs discretion, and that it should be permitted to substitute an umbrella excess liability policy for the minimum limits (GNAPs Petition ¶ 67).

GNAPs also asserts that Verizon's requirements are discriminatory because Verizon self-insures and is, therefore, imposing costs where it has none in order to make GNAPs non-competitive (Exh. GNAPs-2, at 8-9; GNAPs Brief at 63; GNAPs Reply at 25). GNAPs admits that Verizon has not excluded the possibility that GNAPs can self-insure, but GNAPs maintains that Verizon has not provided the criteria to do so, which, GNAPs alleges, is indicative of the

one-sided negotiations in which a monopoly with leverage engages (GNAPs Brief at 63).

GNAPs contends that §21 of the General Terms and Conditions are related to Arbitration Issue No. 8 (GNAPs Petition ¶ 67).[40]

b. Verizon

Verizon argues that its proposed insurance requirements are reasonable and necessary for the protection of its network, personnel, and other assets in the event GNAPs has insufficient resources (Verizon Brief at 96). In support, Verizon notes that its proposal is consistent with what Verizon requires of other carriers (Id. at 96-97). Additionally, Verizon states that the interconnection agreement resulting from this proceeding will permit GNAPs to collocate at Verizon's facilities, and that collocation increases Verizon's risk and exposure to loss in many ways, including: (1) the risk of injury to employees; (2) possible damage to or loss of facilities; (3) the risk of fire or theft; (4) the risk of security breaches; and (5) possible interference with or failure of the network (Id. at 99). Furthermore, Verizon asserts that because

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[40] The Department notes that in Exh. GNAPs-2, the Direct Testimony of William J. Rooney, General Counsel for GNAPs, Mr. Rooney misstates Verizon's insurance requirements at issue in this proceeding and also incorrectly identifies the proper contract section (See Exh. GNAPs-2, at 5). GNAPs does properly identify on brief the specific contract language in dispute.

its risk is much greater than GNAPs' risk, it is appropriate for the agreement to reflect this asymmetrical risk (Exh. VZ-4, at 10; Verizon Brief at 103).

Moreover, Verizon asserts that the Parties operate in a volatile industry and in a society in which either party could be held liable for the acts of the other; accordingly, says Verizon, it maintains an extensive insurance program that protects both Parties (Verizon Brief at 99). On the other hand, Verizon states that GNAPs' proposed limits of $1 million are inadequate, noting that damage or injury to Verizon's network, assets or employees could easily exceed the limits of GNAPs' proposed coverage (Exh. VZ-4, at 8; Verizon Brief at 99).

Verizon further contends that automobile liability insurance and excess liability coverage should be provided to assure that GNAPs vehicles, or GNAPs' employees' vehicles, used in proximity to Verizon's network are adequately insured (Verizon Brief at 100). Verizon also maintains that GNAPs' proposal to make the insurance requirements provision a mutual obligation makes no sense because: (1) Verizon maintains a financially sound insurance program; (2) the risks are increased primarily for Verizon; and (3) for certain provisions, such as the additional insured provisions, it would counteract the benefits to have both Parties name the other as additional insureds (Exh. VZ-4, at 9-10; Verizon Brief at 100). As to GNAPs' contention that Verizon gains a competitive advantage because it self-insures, Verizon dismisses this claim as unfounded, noting Verizon's extensive insurance

program (Verizon Brief at 103). Finally, Verizon cites to FCC decisions, as well as other state arbitration orders, in support of its proposed insurance requirements (Verizon Brief at 97, 102-103). Verizon notes that the aggregate amount of insurance it seeks from GNAPs falls below the FCC's measure of reasonableness (Verizon Brief at 97, citing Special Access Expanded Interconnection Order[41]). Accordingly, Verizon contends its proposed insurance requirements are reasonable and urges the Department to adopt its proposal.

3. Analysis and Findings

Two of Verizon's proposed insurance requirements are consistent with that which the Department has approved in Tariff No. 17, namely, the limits for Commercial General Liability and Worker's Compensation Insurance. Because the insurance requirements in Tariff No. 17 were approved by the Department, we find that Tariff No. 17 serves as an appropriate benchmark for insurance limits. Because Verizon's proposed limits for

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[41] In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, CC Docket No. 93-162, Second Report and Order, FCC No. 97-208, (rel. June 13, 1997) ("Special Access Expanded Interconnection Order").

Commercial General Liability and Worker's Compensation Insurance are identical to the limits in Tariff No. 17 for these two types of insurance, we find Verizon's proposal reasonable and hereby approve §§ 21. 1. 1 and 21.1.4 of the General Terms and Conditions.

As to the requirements that are different from Tariff No. 17, we find as follows. First, the umbrella/excess liability coverage of $5 million in Tariff No. 17 has been increased to $10 million. We do not dispute that the exposure and risk present with interconnection and access to network elements as a result of today's environment may have increased (Exh. VZ-4, at 6; Exh. DTE-VZ 1-1). Nor do we dispute Verizon's claim that the cost to secure the $10 million coverage is minimal (See Exh. VZ-4, at 13).[42] But, Verizon has not persuaded us to conclude that the limit should be twice that which the Department approved in Tariff No. 17. Verizon's interconnection tariff only requires CLECs obtain $5 million in umbrella/excess liability coverage, and Verizon has not proposed any modifications to increase the umbrella/excess liability coverage limit in Tariff No. 17. Thus, we conclude that $5 million in excess/umbrella liability coverage is adequate, even

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[42] GNAPs failed to respond to the Department's record request, RR-DTE-8, for information as to the cost to secure the $10 million insurance limit (See Tr. at 191). The Department therefore imputes a negative inference and concludes that the incremental cost to purchase this insurance is minimal, as Verizon contended.

in today's environment, and we reject Verizon's proposed limit of $10 million. Likewise, GNAPs has not provided any persuasive argument that the limit should be reduced to one fifth of the Department-approved limit of $5 million. Accordingly, we direct the Parties to include a $5 million limit for excess umbrella liability coverage in §21.1.3 of the General Terms and Conditions.

The second substantive difference between Verizon's proposal and Tariff No. 17 is that Verizon seeks to require GNAPs to maintain Commercial Motor Vehicle Liability insurance of $2 million, whereas Tariff No. 17 does not contain any specific provision for this. We note that the FCC has found that "it is not unreasonable for LECs to require interconnectors to carry a reasonable amount of automobile insurance, provided that interconnector-employees are permitted to park their vehicles on LEC property." Special Access Expanded Interconnection Order at ¶345. We conclude similarly and find Verizon's proposal for a separate requirement is consistent with requirements in Tariff No. 17. We further conclude that a separate requirement for vehicle liability insurance is reasonable, given the variety of types of vehicles and equipment used on Verizon's property (Exh. DTE-VZ 1-1). Furthermore, because Verizon's proposed $2 million limit for automobile insurance is consistent with the limits for the other required forms of insurance, we find the limit amount reasonable. Accordingly, we approve Verizon's proposed § 21.2 of the General Terms and Conditions. Even though the interconnection agreement at hand requires insurance at levels above and in addition to that

which is required pursuant to Tariff No. 17, the aggregate level of insurance of $18 million required by Verizon under the agreement, is still below the FCC's measure of reasonableness, which, the FCC stated, was one standard deviation above the industry average, or $21.15 million. See Special Access Expanded Interconnection Order at ¶¶ 346, 348.

As to the form of insurance proposed by Verizon, we find Verizon's proposal to be reasonable. GNAPs has provided no record evidence to support its position that it should be permitted to substitute an excess umbrella policy for the minimum limits for the different types of insurance coverage. Moreover, we agree with Verizon that "[i]t is unfair to put Verizon in a position to potentially be responsible for claims due to loss of GNAPs' real and personal property and that of its employees" (Exh. VZ-4, at 7). Therefore, we approve the language in Verizon's proposed § 21.1.5 of the General Terms and Conditions.

Additionally, given that the risk of collocation falls more heavily on Verizon and, further, given that Verizon maintains an extensive insurance program, we find little merit to GNAPs claim of competitive disadvantage. Likewise, we reject GNAPs' proposal for symmetry in the "additional insured" provision because such symmetry would be inconsistent with the function of this provision, i.e., to designate one insurance company to provide the lead defense (Exh. VZ-4, at 9; Verizon Response ¶205). As Verizon points out, the "additional insured" provision avoids insurance company "finger pointing" (Exh. VZ-4, at 9). Accordingly, we approve Verizon's proposed § 21.6

of the General Terms and Conditions. Regarding GNAPs' claim that Verizon has not provided the criteria for self-insurance, we note that GNAPs did not raise this claim in its Petition, or during the arbitration hearing. Accordingly, we have no record evidence upon which to reach the merits of this allegation.

In sum, we find GNAPs has failed to persuade us that its proposal is the more appropriate. Accordingly, the Department adopts Verizon's proposed § 21 of the General Terms and Conditions of the agreement, with the modifications noted above.

H. Should the Interconnection Agreement Include Language That Allows Verizon to Audit GNAPs' "books, records, documents, facilities and systems"? (Arbitration Issue No. 9)

1. Introduction

Verizon seeks to include a bilateral right to audit the other parties' books to ensure billing accuracy. GNAPs argues that the proposed audit rights provide Verizon with unreasonably broad access to competitively sensitive records.

2. Positions of the Parties

a. GNAPs

GNAPs argues it is unreasonable for Verizon to be privy to its competitors' books and records because they contain competitively sensitive materials which would be costly to sanitize (Exh. GNAPs-2, at 10; GNAPs Brief at 65). GNAPs further contends that Verizon already keeps computer records of call traffic exchanged between the Parties, and that the Parties already have in place a practice of verifying records on a monthly basis (Exh. GNAPs-2, at 10; GNAPs Brief at 65). Additionally, GNAPs states that Verizon pays GNAPs based on Verizon's count of minutes-of-use ("MOUs"), and that billing disputes involve GNAPs disputing Verizon's MOU count (GNAPs Reply at 26). Thus, GNAPs insists that Verizon does not need to audit GNAPs' information to verify traffic for billing (Id.). GNAPs, however, states that it is amendable to providing traffic reports and Call Data Records ("CDRs") necessary to verify billing, stating that with CDRs available, there is no legitimate basis to insist on access to GNAPs' books and records (GNAPs Brief at 65). Finally, GNAPs asserts that Verizon's proof of allegations about an illegal billing scheme by GNAPs is nothing more than unproven allegations in a complaint it filed against GNAPs (GNAPs Reply at 26).

GNAPs states that §7 of the General Terms and Conditions, §8.5.4 of the Additional Services Attachment, and §§6.3 and 10.13 of the Interconnection Attachment are related to Arbitration Issue No. 9 (GNAPs Petition ¶ 70).

b. Verizon

Verizon contends that GNAPs' deletion of §7 of the General Terms and Conditions, and §10.13 of the Interconnection Attachment would delete all of Verizon's proposed audit provisions, and eliminate either party's ability to verify the accuracy of the other's bills (Verizon Brief at 105).[43] But, Verizon notes, audit provisions are common in the industry, including in Massachusetts (Exh. VZ-3, at 7; Verizon Brief at 107). In addition, Verizon asserts, GNAPs opposition is based on a misunderstanding of Verizon's proposal (Verizon Brief at 105). First, Verizon notes that its proposal applies to both Parties (Id. at 106). Second, Verizon points out that any audit would be performed by independent certified public accountants, and the audited party may request a protective agreement or order (Id.). Finally, Verizon states its proposal is not unreasonably broad in that the audit is limited to records, documents, employees, books, facilities, and systems necessary to assess the accuracy of the audited party's bills (Id.).

Verizon also points to GNAPs' history to support its audit proposal. Specifically, Verizon states that in New York, "Verizon uncovered what it believed to be an apparent illegal billing scheme that GNAPs implemented to overcharge Verizon millions of dollars under the guise of reciprocal compensation" (Exh. VZ-3, at 5, citing Verizon's Complaint filed in

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[43] Verizon correctly notes that GNAPs fails to include any disputed language with regard to §6.3 of the Interconnection Attachment (Exh. VZ-3, at 8; Verizon Response ¶210).

New York Telephone Company, et. al. v. Global NAPs, Inc. et. al., No. 00 Civ. 2650 (FB) (RL) (E.D.N.Y.)). Verizon argues that it wants to avoid history repeating itself, and insists that having an independent third-party accountant audit GNAPs' records is preferable to initiating litigation to obtain needed information (Verizon Brief at 110).

Moreover, Verizon contends that, although GNAPs does not include any disputed language in this section, the audit provisions of §8.5.4 of the Additional Services Attachment relating to access to OSS provides Verizon with the right to monitor its OSS so that all carriers can receive uninterrupted and reliable access to this system (Exh. VZ-3, at 9; Verizon Brief at 107). Additionally, Verizon states that its OSS contains customer proprietary network information, which Verizon is obligated to protect and to release to authorized parties only (Exh. VZ-3, at 9; Verizon Brief at 107-108). To fulfill that obligation, Verizon asserts that it must be able to audit GNAPs' use of Verizon's database (Exh. VZ-3, at 9; Verizon Brief at 107-108).

Finally, Verizon argues that its proposal in this proceeding is similar to that which the Department adopted in MediaOne. More precisely, Verizon notes that in MediaOne, the Department rejected MediaOne's audit proposal because it was too broad and adopted Bell Atlantic's proposal, which Verizon states is nearly identical to the audit language Verizon proposes in this case (Exh. VZ-3, at 11, citing MediaOne at 140). In fact, Verizon states that its proposed §10.13 and §6.3 of the Interconnection Attachment contain identical language as §6.3.13 and

§5.7.5, respectively, of the agreement between Verizon and MediaOne's successor corporation, AT&T Broadband (Id. at 12). In sum, Verizon asserts that the language and rationale adopted by the Department in MediaOne is identical or substantially similar to the language and rationale applicable in this case (Id.).

3. Analysis and Findings

We find that GNAPs' concerns are without merit. For instance, Verizon's audit proposal does not contain the broad audits rights which we previously rejected in MediaOne. Rather, Verizon's proposal is specifically aimed at auditing "books, records, documents, facilities and systems for the purpose of evaluating the accuracy of the Audited Party's bills" (General Terms and Conditions §7.1) (emphasis added). Thus, Verizon's proposal is more akin to the specific audit rights we permitted in MediaOne, at 140, as well as in Greater Media, D.T.E. 99-52, at 79 (September 24, 1999). Additionally, Verizon's proposal addresses GNAPs' confidentiality concerns in that any audit is performed by independent third party accountants who are required to execute a confidentiality agreement (See General Terms and Conditions § 7.2). Finally, Verizon's audit provisions are symmetrical, and apply to Verizon as well as GNAPs. Accordingly, we adopt Verizon's proposed audit provisions contained in §7 General Terms and

Conditions and in §§6.3 and 10.13 of the Interconnection Attachment.[44]

Similarly, we find Verizon's proposed §8.5.4 of the Additional Services Attachment reasonable and appropriate. We are convinced of Verizon's need to audit its OSS to ensure reliable access to this database, and to fulfill its obligations under Federal law to protect and to release to authorized parties only proprietary information contained in its database.

Accordingly, we adopt Verizon's proposed language for §8.5.4 of the Additional Services Attachment.

Finally, GNAPs claims that there is no need for audit rights to verify billing, because Verizon pays GNAPs based upon Verizon's MOU count, and thus, any billing disputes between the Parties involve GNAPs disputing Verizon's MOU count. But, GNAPs did not provide any record evidence so that the Department could verify this claim. In fact, GNAPs

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[44] Section 6 of the Interconnection Attachment addresses Traffic Measurement and Billing over Interconnection Trunks, and §6.3 permits either party to audit all traffic to ensure that rates are appropriately applied. Section 10 of the Interconnection Attachment addresses Meet-Point Billing Arrangements, and §10.13 grants both Parties the right to audit, subject to §7 of the General Terms and Conditions, various components of access recording. GNAPs did not propose any changes to §6.3, and proposed to delete §10.13 in its entirety.

first raised this claim in its reply brief. Accordingly, we do not accept GNAPs' claim.

In sum, we find Verizon's audit proposal is reasonable, and further find that GNAPs has failed to present convincing argument to support its modifications to the agreement.

I. Should GNAPs Be Permitted To Avoid Its Agreement To Permit Collocation In Accordance With Tariffed Terms? (Arbitration Issue No. 10)

1. Introduction

Verizon raised reciprocal collocation rights as a supplemental issue in its response. Verizon seeks the unconditional right to collocate at GNAPs' central offices, but GNAPs' proposed changes to Verizon's Interconnection Attachment §§2.1.5 et. seq. incorporate language that subjects Verizon's right to collocate in GNAPs central offices to GNAPs's sole discretion.

2. Positions of the Parties

a. Verizon

Verizon states that the Parties have agreed to language in the Collocation Attachment whereby GNAPs agrees to make collocation available to

Verizon according to terms and conditions under GNAPs collocation tariff, if such tariff is in place (Verizon Brief at 114). If GNAPs does not have a collocation tariff in place, Verizon states that the Parties have agreed to negotiate the terms upon which collocation will be provided if Verizon requests collocation (Id.). Verizon notes that GNAPs has expressly requested that the Department approve undisputed provisions in the agreement, which would include the Collocation Attachment (Verizon Reply at 37).

Despite the agreed upon language in the Collocation Attachment, Verizon states that GNAPs seeks to add language into §2.1.5 of the Interconnection Attachment that would subject Verizon's right to collocate to GNAPs' discretion (Verizon Brief at 114). Verizon asserts that GNAPs should not be permitted to undo that which it has already agreed to in one section by adding language to another section, and thus urges the Department to reject GNAPs' attempt to revise §2.1.5 of the Interconnection Attachment (Verizon Brief at 114; Verizon Reply at 37). Moreover, Verizon dismisses, as lacking merit, GNAPs' argument that the agreement somehow discriminates between customers (Verizon Reply at 37). Verizon also argues that because GNAPs did not identify its proposed language for §2.1.5 of the Interconnection Attachment as related to any of the issues in its complaint, the Department should not now address that language (Verizon Brief at 115).

Even if GNAPs had not agreed to permit collocation, Verizon contends that it should be

permitted to do so (Id.). Verizon argues that whether GNAPs is required by law to provide collocation is not the issue, noting that nothing in the Act prohibits the Department from allowing Verizon to collocate (Verizon Reply at 37; Verizon Brief at 115). Verizon further states that, because GNAPs determines all of the interconnection points under GNAPs' proposal, GNAPs could unreasonably limit the terms and conditions for Verizon's interconnection with GNAPs (Id.). Thus, the Department should either permit Verizon to collocate, or prohibit GNAPs from charging distance sensitive transport rates (id.).

Furthermore, Verizon argues that without the option to collocate, it cannot evaluate whether it is more cost effective to purchase transport from GNAPs or build its own facilities to GNAPs (Verizon Brief at 115). Verizon notes that several state commissions have ruled in its favor on this issue, and that fairness dictates that it have comparable choices to those of GNAPs (Id. at 115-116). Verizon states that its proposal gives Verizon reasonable interconnection choices while GNAPs' proposal does not, and, therefore, the Department should adopt Verizon's proposed language in §2.1.5 of the Interconnection Attachment (Id. at 116).

b. GNAPs

GNAPs asserts that there is no state requirement for GNAPs to provide collocation but that it is company policy to do so for the convenience and benefit of its customers (GNAPs Brief at 66). GNAPs notes that it has never rejected a request by

Verizon to collocate at GNAPs' facilities, nor has Verizon ever asked to collocate (Id.). GNAPs insists that it welcomes customers, including Verizon, but that it cannot allow a customer to dictate terms and conditions that purport to involve GNAPs in discrimination between its customers (Id.). GNAPs also indicates that it may not be able to match all terms and conditions requested and required by Verizon, and that GNAPs provides collocation through a corporate entity not a party to this proceeding (Id.). In addition, GNAPs contends that there is no Federal requirement for GNAPs to provide collocation and urges the Department not to impose a state requirement that could potentially place GNAPs in the position of discriminating between customers (Id. at 67).

3. Analysis and Findings

First, we do not attempt to determine whether GNAPs agreed during voluntary negotiations to grant Verizon an unconditional right to collocate at GNAPs' facilities. Nor do we need to. Consistent with the Wireline Competition Bureau, we agree that "there is simply no requirement that a petitioner for arbitration under section 252(b) must present the Arbitrator with the same language discussed during previous voluntary negotiations." Virginia Order at ¶ 57. Thus, we find Verizon's claims regarding GNAPs' attempts to "undo" that which GNAPs agreed to in the Collocation Attachment unconvincing. Our focus here is the disputed language in §2.1.5 of the

Interconnection Agreement, which subjects Verizon's right to collocate to GNAPs' discretion.

The Department has previously dealt with reciprocal collocation rights. Specifically, in MediaOne, at 50, we acknowledged that nothing in the Act specifically requires a CLEC to permit an ILEC to collocate at the CLECs' facilities. But, we also concluded that the Department may require, under state law, a CLEC to do so. MediaOne at 50. The Department, however, declined to impose collocation obligations on CLECs because we determined that such a requirement would conflict with a CLEC's right to interconnect at any technically feasible location it chooses. Id. This decision was upheld on reconsideration where we explained that "if Bell Atlantic chose to collocate at MediaOne's facilities, MediaOne would be forced to accept that type of interconnection in lieu of, for example, a mid-span meet arrangement. Bell Atlantic's choice would limit MediaOne's options." MediaOne Reconsideration Order at 22. In the case at hand, if the Department were to grant Verizon's request for reciprocal collocation rights, we would be overturning our prior decisions on this issue. But, Verizon has not presented persuasive argument that would convince us to disturb our earlier decisions. The potential limitations imposed on a CLEC's interconnection options, if an ILEC decided to collocate at the CLEC facilities, remain our primary concern.

Likewise, Verizon's insistence that fairness dictates it have comparable interconnection choices as GNAPs rings hollow. The interconnection

standards outlined in the Act for ILECs and CLECs are not symmetrical. Rather, the burdens imposed by the Act fall much more heavily on ILECs. Thus, appeals based upon fairness are not convincing. Accordingly, we reject Verizon's proposed language for §2.1.5 of the Interconnection Agreement, and adopt GNAPs' proposed language. We find that GNAPs' discretionary grant of collocation rights to Verizon is consistent with our prior policy and with the Act. We further find no Federal or Department precedent for Verizon's alternative request that we prohibit GNAPs from charging distance sensitive rates, and we reject it accordingly.

J. Should GNAPs Be Permitted to Avoid the Effectiveness of Any Unstayed Legislative, Judicial, Regulatory or Other Governmental Decision, Order, Determination or Action? (Arbitration Issue No. 11)

1. Introduction

GNAPs seeks a provision in the interconnection agreement at General Terms and Conditions § 4.7 that would require Verizon to delay the effect of a change in law until such law is "final and non-appealable," regardless of whether the change in law is subject to a judicial or regulatory stay. Verizon proposes to give effect to all changes in law.

2. Positions of the Parties

a. GNAPs

GNAPs claims that, "no party should be permitted to avoid the effectiveness of any unstayed legislative, judicial, regulatory or other governmental decision, order, determination or action" (GNAPs Reply Brief at 28). GNAPs further submits that both Parties should follow the law (GNAPs Brief at 67; GNAPs Reply Brief at 28).

b. Verizon

Verizon states that its proposed General Terms and Conditions §4.7, a subsection of "Applicable Law," ensures that the contract reflects changes in law (Verizon Brief at 117). Verizon argues that GNAPs' proposal to delay implementation of a change in law until appeals are exhausted, even if the change in law is not subject to a stay, is "patently unreasonable" and "unfounded" (Verizon Brief at 117; Verizon Reply Brief at 38). According to Verizon, GNAPs' true motive is to "base Verizon MA's obligations on what GNAPs wants governing law to be, not what it actually is" (Verizon Reply Brief at 38) (emphasis in original). Verizon states that the Parties' agreement must recognize a change in law if the law is effective (Verizon Brief at 117; Verizon Reply Brief at 38).

Verizon further contends that GNAPs' proposed contract language that addresses discontinuance of service, payment, or benefit, specifying that it must

be "in accordance with state and federal regulations and recognizing GNAPs' state and federal obligations as a common carrier" (See GNAPs' General Terms and Conditions §4.7) is "superfluous and, thus, undesirable from a contract drafting standpoint" (Verizon Brief at 117). According to Verizon, it is "critical to Verizon that it have the right to cease providing a service or benefit if it is no longer required to [do] so under applicable law" (Verizon Brief at 118, footnote omitted; Verizon Reply Brief at 38). Verizon therefore asks the Department to adopt Verizon' s proposed General Terms and Conditions § 4.7.

3. Analysis and Findings

GNAPs proposes two additions to General Terms and Conditions §4.7 that the Department deems inappropriate. First, GNAPs' proposes to add the phrase "final and non- appealable" in reference to "any legislative, judicial, regulatory or other governmental decision, order, determination or action." The Department finds that this language, if adopted, would have the undesirable effect of staying the effectiveness of any change in law pertinent to the contract regardless of whether a judicial stay is ever requested or granted. Second, GNAPs proposes language that addresses discontinuance of service, payment, or benefit, specifying that it must be "in accordance with state and federal regulations and recognizing GNAP's' state and federal obligations as a common carrier." The Department finds that the interconnection agreement already specifies the

terms and conditions under which Verizon may discontinue service, including the timing and other procedures relating to discontinuance, and thus, GNAPs' proposed language is unnecessary. Accordingly, Verizon's proposed language for General Terms and Conditions §4.7 is adopted.

K. Should GNAPs be Permitted to Insert Itself Into Verizon's Network Management to Prospectively Gain Access to Network Elements That Have Not Yet Been Ordered Unbundled? (Arbitration Issue No. 12)

1. Introduction

This issue relates to General Terms and Conditions §42 (Technology Upgrades), which discusses network upgrades and the responsibilities of interconnecting carriers. The disputed contract language relates to the consequences of such upgrades.

2. Positions of the Parties

a. GNAPs

In response to a Department question, counsel for GNAPs stated during the hearing that "[o]bviously the characterization of the issue pretty much lays out what a potential response would be

anyway" (Tr. at 195).[45] In its brief, GNAPs offers no position on the issue because "Verizon framed the issue in such an argumentative and vague manner that Global cannot be expected to reply" (GNAPs Brief at 67). In its reply brief, GNAPs responds to this issue by stating that "Global wants some protections that as a customer it will (a) have access to the same technologies deployed in Verizon's network and (b) Verizon will not deploy new technologies which will affect Global's service quality without notice and adequate joint testing" (GNAPs Reply Brief at 28).

b. Verizon

Verizon argues that its proposed language in General Terms and Conditions §42 (Technology Upgrades) is "necessary to memorialize Verizon's right to upgrade and maintain its network, ensure that GNAPs does not force Verizon to unbundle its network absent a requirement to do so, and make GNAPs financially responsible for interconnecting with Verizon's network" (Verizon Brief at 119). According to Verizon, the dispute on this issue relates

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[45] In its Reply, Verizon framed Arbitration Issue No. 12 as follows: "Should GNAPs be Permitted to Insert Itself Into Verizon's Network Management or to Contractually Eviscerate the 'Necessary and Impair' Analysis to Prospectively Gain Access to Network Elements That Have Not Yet Been Ordered Unbundled?" (Verizon Response at 112).

to the consequences of technology upgrades, not whether Verizon has a right to upgrade its network (Id.).

Verizon states that applicable law only requires Verizon to "provide GNAPs unbundled access to network elements that have been declared UNEs and that pass the necessary and impair test" (Verizon Brief at 119) (footnote omitted). Accordingly, Verizon claims that the language GNAPs adds requiring Verizon to offer fiber and "next generation technology" as unbundled network elements is unnecessary (Id.). On the issue of financial responsibility, Verizon states that, "if GNAPs wishes to interconnect with or take services or facilities from Verizon, then GNAPs must ensure that its network is compatible with Verizon's network as it may change from time to time" (Id. at 120). Verizon claims that this requirement is necessary to ensure that Verizon maintains its service quality standards and acts in a non-discriminatory manner (Id.).

Verizon states that these issues were examined in the Department's Tariff No. 17 Order, and that §42 of the General Terms and Conditions of its Redlined Agreement is consistent with the Department's prior rulings (Verizon Brief at 121). Verizon further states that its proposed §28 of the General Terms and Conditions (Notice of Network Changes) of its Redlined Agreement "tracks the Department's findings and should be adopted in its entirety" (Id.).

3. Analysis and Findings

In the Tariff No. 17 Order, at 147, the Department held that an ILEC's duty under Section 251 (c)(5) of the Act "requires Bell Atlantic [now Verizon] to provide notice of its planned network changes and upgrades." Although the Department entrusted "Bell Atlantic [now Verizon] with the authority to make all final decisions with regard to its planned network changes and upgrades," the Department ordered Verizon "to provide a mechanism for CLECs to submit formal comments and suggestions as to proposed network changes and upgrades." Id. at 148. Therefore, Department precedent requires Verizon to provide GNAPs with notice of any network changes. We agree with Verizon that its proposed §28 of the General Terms and Conditions is consistent with Department precedent and therefore adopt it.

As to the cost to GNAPs to accommodate Verizon's network changes in its own network, the Department found it unnecessary to "require Bell Atlantic to reimburse CLECs for costs associated with network changes and upgrades." Tariff No. 17 Order at 149. The Department affirms its prior determination. The Department finds no basis to shift responsibility for CLECs' costs associated with Verizon's network changes and upgrades; therefore, we reject GNAPs' proposal to do so.

Next, we find GNAPs' attempt to address Verizon's obligation to provide unbundled access to network elements, including next generation technology, goes beyond the requirements imposed by the Act. Verizon is not required to provide unbundled access to any and all network elements, but only to

those elements that have been declared UNEs because they have passed the "necessary and impair" test.[46] Until next generation technology, a term which is not even defined by GNAPs, has been declared a UNE, Verizon is not required to provide unbundled access to it. Accordingly, the Department finds Verizon's proposed contract language for General Terms and Conditions §42 consistent with Department and FCC precedent, and hereby adopt it.

V. ORDER

After due consideration, it is

ORDERED: That the issues under consideration in this Order be determined as set forth in this Order; and it is

FURTHER ORDERED: That the Parties incorporate these determinations into a final agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to Section 252(e)(1) of the Act, within 21 days of the date herein.

By Order of the Department,

/s/

Paul B. Vasington, Commissioner

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[46] See Iowa Utilities Board v. FCC, 219 F. 3d 744 (8th Circuit 2000).

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Deirdre K. Manning, Commissioner

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 09-1308, 09-1309.

GLOBAL NAPS, INC., Plaintiff/Counterclaim Defendant, Appellant,

v.

VERIZON NEW ENGLAND INC. d/b/a Verizon Massachusetts, Defendant/Counterclaim Plaintiff, Appellee,

MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY; PAUL B. VASINGTON, in his capacity as Commissioner; JAMES CONNELLY, in his capacity as Commissioner; W. ROBERT KEATING, in his capacity as Commissioner; DEIRDRE K. MANNING, in her capacity as Commissioner; and EUGENE J. SULLIVAN, JR., in his capacity as Commissioner., Defendants,

v.

GLOBAL NAPS NEW HAMPSHIRE, INC.; GLOBAL NAPS REALTY, INC.; GLOBAL NAPS NETWORKS, INC.; FERROUS MINER HOLDINGS, LTD.; and FRANK GANGI,

Counterclaim Defendants, Appellants,

CHESAPEAKE INVESTMENT SERVICES, INC.; 1120 HANCOCK STREET, INC., 321 HEATH STREET REALTY TRUST; CJ3, INC.; and RJ EQUIPMENT, INC.,

Counterclaim Defendants.

Before
Lynch, Chief Judge
Torruella, Boudin, Lipez
Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: **June 7, 2010**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
/s/ Margaret Carter, Clerk

Bertrand-Marc Allen, Esq. Scott H. Angstreich, Esq. Thomas A. Barnico, Esq. Sean T. Carnathan, Esq. David B. Chaffin, Esq. Keef B. Clemons, Esq. Philip G. Cormier, Esq. Harry Davidow, Esq.

Joel Davidow, Esq. Andrew H. Good, Esq. Lawrence Green, Esq. Dan Hammond Esq. William T. Hogan,

Esq. Joseph J. Koltun, Esq. Lucy Lovrien, Esq. Glenn B. Manishin, Esq.

John W. McGuinness, Esq. Jeffrey C. Melick, Esq. Jason W. Myatt, Esq. Edward J. Naughton, Esq. Eric C. Osterberg, Esq. Richard P. Owens, Esq. Joseph M. Pastore, III, Esq. John O. Postl, Esq.

Gregory G. Rapawy, Esq. William J. Rooney, Jr., Esq. Christopher Savage, Esq. James C. Schroeder, Esq. Andrew C. Shen, Esq. Robert L. Weigel, Esq. Sameuel Zarzour, Esq.

STATUTORY APPENDIX

I. Communications Act of 1934, Pub. L. 416, 48 Stat. 1064

As amended and Codified in Title 47 of the United States Code, the Communications Act of 1934 provides, in relevant part:

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

§ 201. Services and Charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this

chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

II. Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56

As amended and Codified in Title 47 of the United States Code, the Telecommunications Act of 1996 provides, in relevant part:

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any

technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of

any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal

emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the

request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such

restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing,

collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that-

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit

a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies

for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof),

unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and

nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

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(3)

Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-544

IN THE
Supreme Court of the United States

FRANK GANGI,
Petitioner,

v.

VERIZON NEW ENGLAND INC.
D/B/A VERIZON MASSACHUSETTS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT VERIZON NEW ENGLAND INC.

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December 23, 2010

QUESTIONS PRESENTED

In 2006, the First Circuit held that a 2001 Federal Communications Commission ("FCC") order did not prevent the Massachusetts Department of Telecommunications and Energy from compelling one of petitioner's companies to pay respondent's tariffed rates for certain calls delivered over respondent's network. In a separate lawsuit, respondent obtained a $57 million judgment against petitioner personally and against his company for failure to pay the amounts due. In 2010, the First Circuit affirmed that judgment. The questions presented are:

1. Whether the relevant state and federal regulatory agencies, the reviewing federal district court, and the First Circuit correctly concluded that a pricing mechanism the FCC established in 2001 and retained in 2008 that set rates for certain specific types of dial-up Internet Service Provider traffic does not apply to the different calling arrangement at issue in this case.

2. Whether *res judicata* bars petitioner from relitigating the claims and issues resolved by the First Circuit in 2006 because its decision affirmed a final judgment entered by the district court in 2005 that is no longer subject to appeal.

3. Whether the First Circuit correctly held that, by attempting to "sandbag" (Pet. App. 25a) respondent with a late-asserted defense of alleged failure to exhaust administrative remedies, petitioner's company could and did waive any such defense that might exist.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Verizon New England Inc. d/b/a Verizon Massachusetts states the following:

Verizon New England Inc., f/k/a New England Telephone and Telegraph Company d/b/a Bell-Atlantic Massachusetts, is wholly owned by NYNEX Corporation, which in turn is a wholly owned subsidiary of Verizon Communications Inc., a publicly owned company. Verizon Communications Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in Verizon Communications Inc.

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This case presents no question worthy of certiorari. Petitioner Frank Gangi ("Gangi") has failed to show that any relevant circuit split exists or that this case involves any question of nationwide import. His claims of conflict and confusion among the lower courts do not withstand scrutiny. And he omits and misstates important procedural points that render this case an unsuitable vehicle for resolving any question that affects anyone but the parties.

What this case really involves is a last-ditch attempt by Gangi to escape the consequences of his own actions. For years, Gangi's company Global NAPs, Inc. ("GNAPs") engaged in an abusive regulatory arbitrage scheme by gaming the regulations governing intercarrier charges applicable to local "dial-up" telephone calls to Internet Service Providers ("ISPs"). The Federal Communications Commission ("FCC" or "Commission") ultimately adopted rules to shut down this arbitrage scheme that, logically, addressed the calls that were the focus of the scheme.

As relevant here, GNAPs employed a different calling arrangement that allowed long-distance calls to be made to its ISP customers free of the toll charges that would normally apply. GNAPs argued that, under the pricing rules adopted by the FCC to *stop* arbitrage payments to GNAPs (and similar companies), Verizon had to make *additional* payments to GNAPs for such calls. But regulators and courts ruled (after years of litigation and multiple intervening appeals) that the FCC's pricing rules did not apply to those long-distance calls and that GNAPs had to pay Verizon rather than vice versa.

GNAPs refused to pay, leading to more years of litigation — in which it continued to advance new theories relentlessly and to lose at every turn. Ulti-

mately, Verizon obtained a judgment against GNAPs for $57 million, and the courts held Gangi personally liable for that amount after piercing GNAPs' corporate veil as a sanction for Gangi's destruction of evidence and "lie[s] to the court," Pet. App. 44a.

GNAPs, which (along with other Gangi-owned companies) is now controlled by a Receiver, does not seek certiorari. Gangi does, but his petition lacks any basis to support a grant. As the D.C. Circuit observed as long ago as 2001 in addressing another part of this same controversy, "GNAPs" — and now Gangi — "sought to game the . . . rules, and lost." *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 260 (D.C. Cir. 2001). Nothing about that well-deserved loss warrants review.

STATEMENT

As the district court observed in its final grant of summary judgment to Verizon, "[t]he history of this case is a protracted and complicated one." Pet. App. 54a. As the court of appeals observed years earlier, that complexity stems from a series of "efforts by GNAPs," and now Gangi, "to delay or avoid payment of . . . sums past due to Verizon" through repetitious litigation. *GNAPs IV*, 489 F.3d at 18.[1]

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[1] This brief uses the same short-form citations for prior appeals that the First Circuit did in its most recent decision. *See* Pet. App. 3a-4a (identifying the cases as: *Global NAPs, Inc. v. Verizon New England Inc.*, 396 F.3d 16 (1st Cir. 2005) ("*GNAPs I*"); *Global NAPs, Inc. v. Massachusetts Dep't of Telecomms. & Energy*, 427 F.3d 34 (1st Cir. 2005) ("*GNAPs II*"); *Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59 (1st Cir. 2006) ("*GNAPs III*"), *reprinted in* Pet. App. 75a-111a; *Global NAPs, Inc. v. Verizon New England Inc.*, 489 F.3d 13 (1st Cir. 2007) ("*GNAPs IV*")). It refers to that most recent decision, *Global NAPs, Inc. v. Verizon New England Inc.*, 603

1. From at least 2000 to 2006, GNAPs provided ISPs with an arrangement known as "Virtual NXX" (or "VNXX"). "NPA-NXX" represents the first six digits of a ten-digit telephone number under the North American Numbering Plan. For example, in this Court's general number (202) 479-3000, the NPA-NXX is "(202)-479." Historically, each NPA-NXX has corresponded to a particular telephone exchange in a particular local calling area. A "Virtual NXX" number is one assigned to a customer that is physically located outside of the exchange associated with the NPA-NXX in its assigned telephone number. The call to a Virtual NXX number appears local to the person dialing the number, though the recipient of the call is far away. The call also appears local to the telephone company (here, Verizon) that serves the caller.

GNAPs assigned Virtual NXX numbers associated with exchanges throughout Massachusetts to its ISP customers, which sold "dial-up" Internet access. "Dial-up" is a form of Internet access in which a customer's modem, using the same kind of telephone line used for voice calls, makes a standard telephone call to a modem belonging to the ISP. This case thus does not involve any broadband service, such as that provided over Verizon's FiOS and DSL offerings or a cable company's cable modem service; any wireless service; or any service using Voice over Internet Protocol ("VoIP").

The Virtual NXX numbers that GNAPs assigned allowed its ISP customers to offer to their own Massachusetts customers, who purchase local telephone service from Verizon among others, the ability

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F.3d 71 (1st Cir. 2010), *reprinted in* Pet. App. 1a-50a, as "*GNAPs V.*"

to access the Internet by dialing an apparently local telephone number. Callers dialing these Virtual NXX numbers would pay only for a local call, even though their calls were actually travelling to places that would ordinarily trigger a toll charge.[2]

GNAPs argued that Verizon had to pay it charges for completing these Virtual NXX calls to ISPs, claiming that the calls were just like ordinary local calls. *See* 47 U.S.C. § 251(b)(5). Verizon argued that the calls were in fact toll-free, long-distance calls, no different from toll-free, long-distance calls made using a traditional "800" service, and that GNAPs should pay Verizon the charges that would be due under its tariffs for such calls.

2. In 2002, Verizon and GNAPs presented that dispute to the Massachusetts Department of Telecommunications and Energy ("Department").[3] Exercising its authority under 47 U.S.C. § 252 to resolve disputes regarding the terms of the contracts between local telephone companies, known as interconnection agreements, the Department ruled for Verizon. The Department agreed with Verizon that Virtual NXX is essentially a "substitute toll-free calling service" and held that Virtual NXX calls should "be rated as local or toll based on the geographic end points of the call." Pet. App. 159a, 162a. Accordingly, GNAPs would

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[2] Increasingly, the distinction between "local" and "toll" (and between inter- and intrastate toll) is disappearing, as customers purchase flat-rated, any-distance wireline and wireless plans. At the time of the dispute between Verizon and GNAPs, these distinctions mattered more to both consumers and carriers, as they governed the amount that consumers would pay to their carriers and that carriers would pay to each other.

[3] The Department is now known as the Department of Telecommunications and Cable.

have to pay Verizon's tariffed charges on Virtual NXX traffic. The Department ordered the parties to develop contract language to reflect its decision. *See id.* at 168a. The Department later approved a contract between GNAPs and Verizon containing such language. *See id.* at 90a.

In reaching its decision, the Department rejected GNAPs' argument that its ruling was inconsistent with the FCC's *ISP Remand Order*.[4] *See id.* at 152a-153a. In that order, the FCC adopted a pricing methodology for certain dial-up ISP traffic to address the significant "regulatory arbitrage" problem that had arisen because dial-up traffic is one way — "ISP modems do not generally call" back — so payments by carriers originating these calls led to "large one-way flows of cash" to companies, like GNAPs, with ISP customers. *ISP Remand Order* ¶¶ 8, 21, 70. Indeed, before the FCC's ruling, GNAPs was among the companies that, together, had generated a total of nearly $2 billion annually in abusive "windfall" profits by signing up ISP customers exclusively or almost exclusively. *Id.* ¶ 70. When GNAPs sought to shield itself behind the FCC order meant to curtail its own uneconomic arbitrage, however, the Department rejected GNAPs' contention that the FCC's pricing rules "control[] . . . [the] issues in th[e] arbitration." Pet. App. 147a.

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[4] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

GNAPs filed a complaint (the "2002 Complaint")[5] in the District of Massachusetts challenging the Department's ruling with respect to Virtual NXX traffic.[6] GNAPs claimed that the Department's ruling on Virtual NXX ISP traffic was inconsistent with the *ISP Remand Order*.

3. Throughout 2003 and 2004, Verizon continued to deliver calls to GNAPs and to bill GNAPs charges for those calls pursuant to the terms of the contract the Department had approved. GNAPs did not pay the bills. On March 17, 2005, Verizon warned GNAPs that it already owed Verizon $42 million and that, if GNAPs did not pay, Verizon would terminate service. In response, GNAPs obtained an order from the district court requiring Verizon to continue providing service, claiming that it could not pay the amounts due under the interconnection agreement and that its business would be destroyed if service were terminated. *See* Pet. App. 35a-36a.

The district court then turned to the merits of the 2002 Complaint. On September 21, 2005, it granted partial summary judgment to the Department and

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[5] *See* Complaint, *Global Naps, Inc. v. Verizon New England Inc., et al.*, No. 02-12489 (D. Mass. filed Dec. 30, 2002) ("2002 Complaint").

[6] In 2003, GNAPs filed a second complaint, which challenged the Department's decision that GNAPs could not refuse to sign an interconnection agreement reflecting the Department's ruling on Virtual NXX traffic. *See* Complaint, *Global Naps, Inc. v. Verizon New England Inc., et al.*, No. 03-10437 (D. Mass. filed Mar. 6, 2003) ("2003 Complaint"). The parties litigated the 2003 Complaint first. The district court granted summary judgment for the Department and Verizon and entered a final judgment against GNAPs on May 13, 2004. On January 19, 2005, the First Circuit affirmed in *GNAPs I*. On May 31, 2005, this Court denied GNAPs' petition for certiorari.

Verizon, rejecting GNAPs' claim that the pricing regime in the *ISP Remand Order* governed the calling arrangement at issue here.[7] GNAPs then stipulated to an order dismissing all other claims in the 2002 Complaint with prejudice in order to obtain an appealable final judgment. The district court entered the stipulated judgment on October 31, 2005.

On appeal, GNAPs did "not challenge the [Department's] determination that whether a call is local or 'interexchange' should be based on the geographic endpoints of the call, or the decision to impose access charges on non-ISP-bound VNXX calls." *GNAPs III*, Pet. App. 103a. Instead, GNAPs claimed only that the FCC intended for its ISP pricing regime to control "charges for . . . non-local ISP-bound traffic," such as the Virtual NXX traffic at issue in this case. *Id.* at 103a-104a. Verizon and the Department responded that the FCC's pricing regime applied only where the ISP and the caller were located in the same local calling area. The First Circuit invited and received an *amicus* brief from the FCC concerning the correct interpretation of the *ISP Remand Order*. The FCC's brief acknowledged that, "[i]n some respects, the *ISP Remand Order* appears to address all calls placed to ISPs," but clarified that "the Commission [had been] focused on calls between dial-up users and ISPs in a single local calling area." *Id.* at 108a (internal quotation marks omitted; alteration in original).

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[7] The petition incorrectly identifies the district court's September 21, 2005 ruling as the resolution of "cross-motions for summary judgment on [Verizon's] counterclaim." Pet. 12. That counterclaim was raised in response to GNAPs' 2005 Complaint, not the 2002 Complaint. *See* Complaint, *Global NAPs, Inc. v. Verizon New England Inc.*, No. 05-10079 (D. Mass. filed Jan. 12, 2005) ("2005 Complaint"); *infra* p. 9.

The First Circuit affirmed. *See GNAPs III*, *reprinted in* Pet. App. 75a-111a. The First Circuit held that neither the text nor the context of the *ISP Remand Order* supported a conclusion that the order's pricing regime "clearly preempt[ed] state authority to impose access charges for interexchange VNXX ISP-bound traffic." *Id.* at 103a. It reasoned that, in light of the "important distinction" in telecommunications law between different types of charges, the FCC would have spoken more clearly if it had intended its new pricing mechanism to apply to the tariffed charges at issue here. *Id.* at 105a.

In addition, the court relied on the venerable "'maxim . . . that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.'" *Id.* at 106a (quoting *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006), quoting in turn *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, J.)). Because the *ISP Remand Order* as a whole was focused on a problem of arbitrage in the reciprocal-compensation system for calls within the same calling area, the court declined to construe the FCC's pricing regime meant to remedy that arbitrage as displacing otherwise applicable tariffed charges for different call arrangements simply because some language in it might read that way in isolation.[8]

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[8] After affirming, the First Circuit "remanded to the district court for any further proceedings." Pet. App. 111a. The only further proceedings stemming from the 2002 Complaint involved a postjudgment dispute over $16 million in security that GNAPs had provided for the orders that had compelled Verizon to continue providing service. *See GNAPs IV*, 489 F.3d 13 (affirming the district court's release of the security to Verizon).

4. On January 12, 2005, while the 2002 Complaint was pending, GNAPs filed the 2005 Complaint in the district court. The 2005 Complaint alleged that the FCC's *Core Forbearance Order*,[9] which modified certain aspects of the FCC's pricing regime for ISP traffic, entitled GNAPs to bill Verizon for traffic delivered to GNAPs' ISP customers.[10] On March 14, 2005, Verizon answered the 2005 Complaint and counterclaimed for the originating charges that GNAPs owed under the parties' interconnection agreement. GNAPs' reply to Verizon's counterclaim did not raise any argument that the counterclaim had to be presented to the Department before the district court could rule upon it.[11]

During 2005 and 2006, Verizon uncovered evidence that assets and revenues belonging to GNAPs had been moved to other entities also owned by Gangi. Verizon therefore moved for prejudgment remedies to secure its counterclaim. It also sought judgment on the pleadings on the 2005 Complaint. The district court granted both of Verizon's motions. Verizon then diligently attempted to attach GNAPs' assets, but was able to locate less than $1 million in GNAPs'

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[9] Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) ("*Core Forbearance Order*"), *petitions for review denied, In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

[10] In resisting Verizon's later motion for judgment on the pleadings, GNAPs argued to the district court that the "basis of [its] claim" in the 2005 Complaint was "the [i]nterconnection [a]greement" between the parties. C.A. App. 399.

[11] The relevant portions of the record can be found at C.A. App. 65-75 (2005 Complaint), C.A. App. 90-107 (Verizon's Answer and Counterclaim), and C.A. App. 125-28 (GNAPs' Reply to Verizon's Counterclaim).

name. Verizon accordingly added Gangi (among numerous other entities) as a counterclaim defendant, seeking to hold him personally liable by piercing the veils of the corporations he owned.

GNAPs and Gangi moved twice to dismiss Verizon's amended counterclaim. The first motion raised a challenge to the district court's subject-matter jurisdiction under 28 U.S.C. § 1367 that is not presented in the petition. In the second motion, filed in June 2007, GNAPs raised for the first time the argument that Verizon's counterclaim against GNAPs itself (originally asserted in March 2005) had to be presented to the Department before the district court could rule upon it. *See* Pet. App. 11a. On January 7, 2008, the district court denied that motion. *See id.* at 70a-74a.

5. Discovery continued into the summer of 2008. During that time, Verizon learned that Gangi and his companies had destroyed or withheld business and accounting records that were necessary for Verizon to make its case against GNAPs, Gangi, and the other counterclaim defendants. As a result, on October 16, 2008, Verizon sought a default judgment on all of its claims.

While the motion for default judgment was pending, the FCC issued the *Second ISP Remand Order*.[12] In that order, the FCC responded to the D.C. Circuit's 2002 remand of its *ISP Remand Order* by speci-

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[12] Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 24 FCC Rcd 6475 (2008) ("*Second ISP Remand Order*"), *petitions for review denied*, *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) ("*Core v. FCC*"), *cert. denied*, Nos. 10-185 & 10-189 (Nov. 15, 2010).

fying the source of its legal authority to establish its ISP pricing regime; however, the FCC "maintain[ed]," and did not change, the substance of that regime. *Second ISP Remand Order* ¶¶ 1, 29. On November 14, 2008, GNAPs moved for summary judgment, claiming that the new order had "clarified" that the FCC had intended to preclude imposing charges on GNAPs for any ISP-bound calls, regardless of whether the caller and ISP were in the same local calling area. On November 18, 2008, the district court denied that motion, stating that the *Second ISP Remand Order* could "not undo everything that's happened in the case over the last eight years" and that "it's hard . . . to see how the FCC can effectively overrule the First Circuit."[13]

On December 3, 2008, after an evidentiary hearing, the district court granted default judgment against Gangi and held him personally liable to pay any judgment against GNAPs, finding that Gangi had committed willful discovery misconduct and that Gangi and another GNAPs employee had "lied to the court" on the witness stand in an attempt to conceal their actions. Pet. App. 44a; *see id.* at 44a-47a (summarizing the district court's findings). The district court also ruled on December 4 that GNAPs

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[13] The relevant portion of the district court's November 18 bench ruling is reproduced at C.A. App. 2062-63. Citing the same pages of that transcript, the petition claims (at 14) that the district court "stat[ed] that its prior determination on the issue was 'law of the case.'" The district judge did not say the words Gangi has placed in quotation marks. Gangi's misquotation of the district court is material. As discussed *infra* notes 17 and 18, the question whether the district court's and the First Circuit's prior rulings are mere law of the case or carry the full force of *res judicata* is relevant to Gangi's ability to raise certain questions purportedly presented by this petition.

was judicially estopped from contesting certain statements it had made in 2005 about the charges it would have to pay to Verizon if it lost in *GNAPs III*. *See id.* at 64a-69a (denying reconsideration of that ruling).

On January 22, 2009, the district court granted summary judgment to Verizon on its counterclaim against GNAPs. The court found GNAPs (and therefore Gangi) liable for $57,716,714. *See id.* at 53a-64a.

6. On appeal, the First Circuit affirmed. *See GNAPs V*, *reprinted in* Pet. App. 1a-50a. The court rejected GNAPs' and Gangi's argument that the *Second ISP Remand Order* provided a reason for revisiting *GNAPs III*. It concluded that "[t]he *Second [ISP] Remand Order*'s express purpose was to justify — not change — a particular rate system" that the court had previously construed. *Id.* at 18a. It found support for this conclusion not only in the order itself, but also in the D.C. Circuit's opinion upholding the order and in the FCC's brief to the D.C. Circuit in that case. *See id.* at 17a. Accordingly, the court declined to revisit its "h[o]ld[ing], in *GNAPs III*, that [the FCC's rate] system applied only to local ISP traffic." *Id.* at 18a.

The First Circuit also rejected GNAPs' and Gangi's argument that Verizon was required to submit to the Department its counterclaim for amounts due under the interconnection agreement before bringing that claim to the district court. The court first held that the district court had subject-matter jurisdiction over the counterclaim and that nothing in the Telecommunications Act of 1996 ("1996 Act") took that jurisdiction away. *See id.* at 20a-24a. It then reasoned that, because jurisdiction existed, GNAPs' claim amounted at most to "a type of administrative-

exhaustion argument," *id.* at 24a, and that exhaustion requirements that Congress has not expressly made a prerequisite to a court's subject-matter jurisdiction can be waived, *see id.* Noting that "GNAPs did not raise this [exhaustion-type] argument until nearly two years after Verizon filed its counterclaim, and only after GNAPs' other arguments had been rejected," the court concluded that GNAPs had attempted to "sandbag its opponent" and held that the claim was waived. *Id.* at 25a.

The First Circuit also affirmed the district court's other rulings against GNAPs and Gangi. In doing so, the First Circuit held that judicial estoppel against GNAPs was appropriate because "[t]here is no doubt that GNAPs deliberately played fast and loose with the courts in an effort to gain an unfair advantage," *id.* at 38a, and that the district court's entry of "default judgment . . . as a sanction for willful discovery misconduct . . . against . . . Gangi" was "well supported in the record," in part because "Gangi . . . lied to the court about the records GNAPs kept," *id.* at 43a-44a. GNAPs does not challenge those rulings before this Court.

REASONS FOR DENYING THE PETITION

Gangi fails to show the existence of any relevant split among the circuits or other question of importance. The First, Second, and Ninth Circuits are the only ones to have considered whether the FCC's *ISP Remand Order* pricing regime extends to Virtual NXX calls to ISPs. All three agree that it does not. The question also has diminishing practical importance because it is limited to the scope of a regulatory remedy for arbitrage and fraud in the context of dial-up ISP access — an outmoded technology that is rapidly giving way to newer ones. In addition, even if the question warranted review, this case would be an unsuitable vehicle for that review: GNAPs litigated and lost this issue in 2006, that loss is embodied in a final judgment that is no longer subject to review, and Gangi is bound by that judgment's *res judicata* effects.

Gangi similarly falls far short of showing any important or controversial question about the appropriate timing of remedies in cases about interconnection agreements. The First and Second Circuits are the only circuits to have considered whether there is a *nonwaivable* requirement that a litigant seek the interpretation or enforcement of an interconnection agreement from a state commission before going to federal court. Both agree that there is not. The Third Circuit has held that such a requirement exists, but has not determined whether it is waivable. With no split to resolve, Gangi's plea for review seeks nothing more than error correction from this Court. Moreover, the First Circuit did not err when it concluded that GNAPs' attempt to "sandbag" Verizon, Pet. App. 25a, ought to fail.

I. REVIEW OF THE FIRST CIRCUIT'S 2006 DECISION CONCERNING THE *ISP REMAND ORDER* IS UNWARRANTED AND PROCEDURALLY BARRED

A. Gangi Fails To Show Any Significant Conflict Concerning the *ISP Remand Order*

1. The cases that Gangi claims conflict with the First Circuit's 2006 decision in *GNAPs III* are easily distinguishable. His lead case is *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *see* Pet. 17-18. That case does not even mention payments due for dial-up ISP traffic or the *ISP Remand Order*. In *Ting*, the Ninth Circuit held that §§ 201(b) and 202(a) of the Communications Act of 1934 did not preempt certain state contract and consumer protection laws as applied to the predominantly interstate service provided by a long-distance carrier to its end users. *See* 319 F.3d at 1145-46.

Gangi also relies upon *New York SMSA L.P. v. Town of Clarkstown*, 612 F.3d 97 (2d Cir. 2010) (per curiam); *see* Pet. 18-19. Like *Ting*, that case does not mention payments due for dial-up ISP traffic or either *ISP Remand Order*. In *New York SMSA*, the Second Circuit held that a local ordinance that established a local "prefer[ence]" for certain types of wireless telecommunications facilities over others, and that attempted to supplement the FCC's regulation of radio frequency interference, was preempted by § 332(c)(7) of the Communications Act. *See* 612 F.3d at 105-06.

The holdings of *Ting* and *New York SMSA* have nothing to do with the question presented by the

petition.[14] Gangi claims that those cases (along with this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)) establish the general proposition that there is no presumption against preemption in "areas of traditional federal jurisdiction." Pet. 19. That broad claim of generalized tension in the reasoning of circuit-court decisions falls well short of the sharp conflict that calls for review by this Court.

Gangi's claim of tension also mischaracterizes the First Circuit's reasoning. He criticizes that court for relying on a passage from *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). *See* Pet. 17. The First Circuit's citation to *Hillsborough*, however, was specifically about construing the scope of a *regulatory* action. *See GNAPs III*, Pet. App. 101a ("'[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.'") (quoting *Hillsborough County*, 471 U.S. at 718). The First Circuit's reliance on that insight did not create a conflict with *Iowa Utilities Board*, *Ting*, or *New York*

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[14] *Qwest Corp. v. Arizona Corp. Commission*, 567 F.3d 1109 (9th Cir. 2009), which Gangi cites only in passing (at 18), held that a state commission exercising delegated federal authority under 47 U.S.C. § 271 could not rely on its state-law authority to impose certain pricing requirements that the FCC had expressly rejected. *Qwest*, like *Ting* and *New York SMSA*, does not mention payments due for dial-up ISP traffic or either *ISP Remand Order*. Indeed, *Qwest* undercuts Gangi's claim of a conflict: the Ninth Circuit noted in *Qwest* that it "agree[d] with" the First Circuit's decision in *Verizon New England Inc. v. Maine Public Utilities Commission*, 509 F.3d 1 (1st Cir. 2007). 567 F.3d at 1119.

SMSA, all of which dealt primarily or exclusively with questions of *statutory* construction.

2. Gangi then argues that the First Circuit "turn[ed] a blind eye to the FCC's manifest intent to establish an exclusive method of intercarrier compensation for internet-bound calls." Pet. 20. He relies upon the Eighth Circuit's decision in *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009), in support of his argument. Again, however, the Eighth Circuit's opinion does not mention payments due for dial-up ISP traffic or either *ISP Remand Order*. Instead, that court addressed the effect of a 2004 FCC order that addressed VoIP traffic, not dial-up ISP traffic. *See id.* at 905. This case does not involve any VoIP traffic. Gangi's unsupported assertion that two orders addressing different issues are materially identical is hardly enough to show the need for this Court's review.

Gangi further ignores the FCC's later indication that the First Circuit correctly construed the agency's intent as to dial-up ISP traffic, explaining to the D.C. Circuit that "the First Circuit had no difficulty recognizing [in *GNAPs III*] that the *ISP Remand Order* did not address the regulatory treatment of VNXX calls." Opposition of FCC to Petition for a Writ of Mandamus at 27 n.22, *In re Core Communications, Inc.*, No. 07-1446 (D.C. Cir. filed Dec. 27, 2007). The FCC's interpretation of its own regulatory regime is subject to a highly "deferential standard." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

3. Gangi next turns to a case that did involve the *ISP Remand Order* but had nothing to do with construing the scope of the FCC's pricing rules or whether they extend to long-distance dial-up ISP

traffic. *See* Pet. 24 (citing *Core v. FCC*, 592 F.3d 139). In *Core v. FCC*, the D.C. Circuit held that, in the *Second ISP Remand Order*, the FCC had adequately explained its statutory authority to promulgate the pricing rules that had been in effect since the *ISP Remand Order*. *See* 592 F.3d at 141. In doing so, the court approved the FCC's conclusion that ISP-bound traffic is within the FCC's statutory authority to regulate under § 201(b), because the dial-up *call* to the ISP (which may take place entirely in one state) is part of a longer interstate *communication* that begins with the dial-up user and ends somewhere on the Internet. *See id.* at 143-45.

As the First Circuit concluded, *Core v. FCC* said nothing to suggest that the long-distance calls at issue here were governed by the pricing rules imposed in the *ISP Remand Order*. *See* Pet. App. 17a. Gangi, moreover, fails to mention that the D.C. Circuit actually *cited GNAPs III* while clarifying that there was no dispute in *Core v. FCC* about the regulatory treatment of "a [local exchange carrier]'s provision of access for completion of a long-distance call." 592 F.3d at 144.

Further, the FCC's brief to the D.C. Circuit in *Core v. FCC* described the "traffic covered by the Commission's interim pricing rules" as that traffic "which occurs when two [local exchange carriers] collaborate to deliver calls to an ISP *within a local calling area*." Brief for FCC at 21, *Core v. FCC*, Nos. 08-1365, *et al.* (D.C. Cir. filed May 1, 2009) ("FCC's D.C. Cir. *Core v. FCC* Br.") (emphasis added). That, of course, is the very holding of *GNAPs III*. And the First Circuit in turn quoted and relied upon that passage from the FCC's brief in *GNAPs V*. *See* Pet. App. 17a. Thus, the First Circuit, the D.C. Circuit, and the FCC have all reviewed one another's reasoning,

and none has noted any tension. Gangi's attempt to manufacture a reviewable conflict from this situation deserves no credence.

4. Finally, Gangi claims (at 25) that *GNAPs III* conflicts with *Verizon Maryland Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004). That case involved a challenge to a state commission arbitration decision to which the *ISP Remand Order* did not apply because the arbitration predated the order's effective date. *See id.* at 367 ("The [*ISP Remand Order*] . . . expressly preserves the arbitration decisions here because they were issued before June 14, 2001."). The Fourth Circuit did not need to, and did not, adopt any holding concerning the preemptive effect of the *ISP Remand Order* on decisions issued after its effective date.

Gangi, however, relies on the Fourth Circuit's statement in dictum that the FCC "adopted a new compensation regime . . . to govern ISP-bound calls and announced that it was stripping state commissions of any authority to formulate the compensation regime for such calls." *Id.* That dictum, however, said nothing about the scope of the FCC's rules and did not opine (much less rule) on whether the *ISP Remand Order* pricing rules reached Virtual NXX ISP-bound traffic.

5. The only circuit case that Gangi cites that actually addresses the same question as the First Circuit did in *GNAPs III* is *Verizon California Inc. v. Peevey*, 462 F.3d 1142 (9th Cir. 2006). In that case, the Ninth Circuit, following the First Circuit, held that the *ISP Remand Order* "has no effect on the determination of whether collection of call origination charges for ISP-bound VNXX traffic is appropriate." *Id.* at 1158. Gangi does not cite the Second Circuit's

decision in *Global NAPs, Inc. v. Verizon New England Inc.*, 454 F.3d 91 (2d Cir. 2006) — despite the fact that his company was a party to that case — but that court, also following the First Circuit, likewise rejected GNAPs' claims that the FCC's ISP pricing rules apply to Virtual NXX ISP traffic, *see id.* at 99-101 (citing *GNAPs III*). The fact that the only other on-point circuit decisions *agree* with the First Circuit is further evidence that review is unnecessary.

B. Limited Conflicts Among State Commissions Do Not Warrant Review

Gangi claims (at 26) that "the question presented here has generated widespread conflict and confusion among state commissions over the scope of their authority over internet calls." This claim would not justify granting a petition for certiorari even if correct. A conflict between state agencies over the interpretation of federal law does not warrant review, because such a conflict can be resolved by the district and circuit courts, or by the FCC.

In any event, the state commission decisions on which Gangi relies show no indication that the First Circuit's decision has created confusion. Instead, they show that *GNAPs III* helped to clarify the law. Every final decision that GNAPs cites as adopting GNAPs' position on the scope of the FCC's ISP pricing rules was issued in January 2005 or earlier. *See* Pet. 26-27 nn.48-50.[15] Accordingly, none of them had the benefit of *GNAPs III*. Gangi does not appear to dispute that, in the wake of *GNAPs III*, final

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[15] Other commissions during that time frame had joined the Department in concluding that the FCC's ISP pricing rules did not apply to long-distance calls to ISPs. *See* Brief of Appellee Verizon at 32-33 & nn.30-32, *GNAPs III*, No. 05-2657 (1st Cir. filed Dec. 14, 2005) (collecting decisions).

decisions at the state commission level have been consistent with the rule adopted by the First, Second, and Ninth Circuits — some without the need for judicial review, and others after review by district courts. *See* Pet. 27-28 nn.52-56.

Gangi also contends that this Court's review is warranted because of "untenable conflict between state commissions and the relevant court of appeals." Pet. 27 & n.56 (citing district court decisions in Arizona and Washington applying *Peevey*). On the contrary, as this Court has recognized, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. The ordinary operation of judicial review does not signal a need for intervention by this Court.

C. The Regulatory Scheme for Dial-Up Internet Access Lacks Prospective Importance

The pricing rules that the FCC established in the *ISP Remand Order* and maintained in the *Second ISP Remand Order* apply to dial-up ISP access, in which a user accesses the Internet over the traditional telephone network. Dial-up Internet access was extremely important more than a decade ago, when it was almost the exclusive means by which individuals and households obtained access to the Internet. Since that time, the explosive growth of broadband Internet access has substantially decreased the need for dial-up access, and that trend continues. As the FCC recently advised this Court, "fewer than 6 percent of Americans use dial-up Internet connectivity as their main form of home access," and the agency's current efforts "to promote broadband deployment . . . will likely further the already substantial decline in use of dial-up services." Brief for the

Federal Respondents in Opposition at 23-24, *Core v. FCC*, Nos. 10-185 & 10-189 (U.S. filed Oct. 12, 2010). Accordingly, even the *validity* of the *Second ISP Remand Order* "present[ed] a narrow question of diminishing practical significance." *Id.* at 23. That is also true of the even narrower question presented here about the scope of the FCC's pricing rules.

Gangi argues (at 30) that the question presented retains practical importance because two state agencies have drawn guidance from *GNAPs III* when considering VoIP traffic, which is not at issue here. The possibility that the decision of a court of appeals might indirectly influence other controversies in the future, however, is not a ground for review. Gangi, moreover, is ill-positioned to make such an argument: GNAPs previously told the First Circuit that "[t]he narrow question presented here is whether the FCC's Order applies to all ISP-bound traffic, including traffic that uses VNXX arrangements." Brief of Appellant GNAPs at 33, *GNAPs III*, No. 05-2657 (1st Cir. filed Nov. 28, 2005).

D. Review of the Scope of the FCC's ISP Pricing Regime Is Barred by *Res Judicata*

In any event, this case is a fatally flawed vehicle for considering the first question Gangi's petition raises. Were it to grant certiorari, this Court would "not have before [it] any issue as to the correctness of" the First Circuit's decision in *GNAPs III*, *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 441 (1986), because that decision is embodied in a final judgment no longer subject to appeal.

The district court's final judgment against GNAPs on the 2002 Complaint was entered on October 31, 2005, affirmed by the First Circuit on April 11, 2006, and is long past the point where it could be reviewed

by this Court. *See supra* pp. 6-8. Verizon filed the counterclaim that the First Circuit addressed in *GNAPs V* in response to GNAPs' 2005 Complaint, which resulted in a separate final judgment from the district court. *See supra* p. 12.[16]

Because the district court's October 31, 2005 judgment is long since final and unappealable, GNAPs' attempt to relitigate the questions presented in *GNAPs III* is barred by *res judicata*.[17] Accordingly, if this Court were now to grant review of Gangi's petition, it could not reach the underlying question of the applicability of the FCC's pricing rules. At most, the only question before this Court would be whether the First Circuit erred in determining that the "*Second [ISP] Remand Order* is not materially different from the *ISP Remand Order* on the issues of concern." Pet. App. 16a. That highly limited question does not warrant review.[18]

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[16] The proceedings arising from the 2002, 2003, and 2005 Complaints were consolidated before the same district judge. However, as the First Circuit explained with regard to the 2002 and 2003 Complaints, this consolidation was only "for purposes of convenience and efficiency" and did not prevent the district court from entering "[s]eparate judgments . . . in each of the . . . cases." *GNAPs I*, 396 F.3d at 22 (internal quotation marks omitted).

[17] Although this Court's review of a prior, interlocutory appellate panel ruling in the same case is not barred by the doctrine of law of the case, *see, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), this rule does not apply to the preclusive effect of a final judgment. *See Sheet Metal Workers*, 478 U.S. at 441 (declining to reconsider on certiorari in a related case the correctness of a lower court's earlier unappealed final judgment); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 432 (1976) (same).

[18] The First Circuit's opinion in *GNAPs V* does not state expressly whether it considered *GNAPs III* to bind GNAPs as a

E. The First Circuit's Decisions Were Correct

Finally, review is unjustified for the additional reason that the First Circuit's decisions were correct. In *GNAPs III*, the First Circuit correctly determined that the pricing regime established in the *ISP Remand Order* was meant to deal with "a particular issue of intercarrier compensation," Pet. App. 110a — the problem of "'reciprocal compensation obligations [as] appl[ied] to the delivery of calls from one [local exchange carrier]'s end-user customer to an ISP in the same local calling area that is served by a competing [local exchange carrier].'" *Id.* at 106a-107a (quoting *ISP Remand Order* ¶ 13). Because the order extensively discussed problems of regulatory arbitrage in that context, *see id.* at 107a-108a, but did not discuss other calling arrangements such as the toll-free, long-distance calls at issue here, the First Circuit correctly concluded that the FCC's pricing rules did not extend to the latter.

That conclusion was reinforced by the FCC's *amicus* brief, which confirmed that the order's "focus[]" was on the arbitrage problems created by paying reciprocal compensation on dial-up ISP traffic where

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matter of *res judicata*. *See* Pet. App. 15a-20a. Verizon clearly preserved in its briefing, however, the argument that GNAPs and Gangi were unable "to evade the bar of *res judicata*." Brief of Appellee Verizon at 51, *GNAPs V*, Nos. 09-1308 & 09-1309 (1st Cir. filed June 11, 2009). GNAPs and Gangi responded that *res judicata* did not apply because the *Second ISP Remand Order* "clarified the controlling law during the parties' continuous and on-going litigation concerning access charge liability." Reply Brief of Appellants GNAPs *et al.* at 8, *GNAPs V*, Nos. 09-1308 & 09-1309 (1st Cir. filed June 25, 2009). That argument is wrong, but, even if it had a colorable chance of succeeding, the substantial likelihood that this case would ultimately turn on a fact-bound procedural issue would nevertheless make it an unsuitable vehicle for answering the question presented.

the caller and the ISP are located within the same local calling area. *Id.* at 108a (internal quotation marks omitted). Furthermore, as noted above, the FCC subsequently endorsed *GNAPs III* in briefing before the D.C. Circuit, explaining to that court that its "pricing rules" encompass the traffic "which occurs when two [local exchange carriers] collaborate to deliver calls to an ISP *within a local calling area*." FCC's D.C. Cir. *Core v. FCC* Br. at 21 (emphasis added).

Finally, the First Circuit also rightly concluded in *GNAPs V* that the *Second ISP Remand Order* is "not materially different from the *ISP Remand Order* on the issues of concern." Pet. App. 16a. That order was intended to clarify the source of the FCC's authority to adopt its pricing rules, not to alter the substance of those rules. *See id.* at 17a (quoting the D.C. Circuit's explanation in *Core v. FCC*, 592 F.3d at 142, that the *Second ISP Remand Order* "'instituted substantially the same rate cap system'" as the original order). This Court should leave undisturbed the First Circuit's correct resolution of that narrow question.

II. REVIEW OF THE QUESTION WHETHER GNAPS WAIVED ANY EXHAUSTION DEFENSE IS ALSO UNWARRANTED

A. Gangi Fails To Establish Any Conflict Relevant to the First Circuit's Waiver Holding

Gangi also fails to show the existence of any split among the circuits concerning the question whether federal law imposes a nonwaivable administrative-exhaustion requirement before a party to an interconnection agreement under the 1996 Act may seek to enforce that agreement in federal court. The First

Circuit held only that GNAPs had waived any exhaustion defense it might have had, and therefore did not need to decide whether such an exhaustion defense in fact exists. *See* Pet. App. 24a-25a. Gangi identifies no circuit case holding the contrary.

1. Gangi first relies (at 31-32) on *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003) (en banc). *BellSouth*, however, did not even decide whether an exhaustion defense exists in cases involving interconnection agreements, much less whether such a defense (if one exists) is waivable. *BellSouth* instead dealt with the question whether Congress's "grant of authority" to state public utility commissions in 47 U.S.C. § 252(e) over the creation of interconnection agreements "encompass[ed] the interpretation of [those] agreements, not just their approval or rejection," and held that it did. 317 F.3d at 1277.

In *BellSouth*, the dispute over the enforcement of the interconnection agreement had been presented initially to the Georgia Public Service Commission, *see id.*, and the question for the court was whether the agency exceeded its jurisdiction by hearing the dispute. The Eleventh Circuit was not faced with any contention that a dispute filed initially to the district court *had to* be presented to the agency. Still less was it faced with a case where (as here) such a defense was raised belatedly after years of litigation in district court.[19]

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[19] Gangi also cites (at 34) *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000) ("*SW Bell v. PUC*"), and *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493 (10th Cir. 2000). Both of those cases, like *BellSouth*, involved the question whether state commissions had authority

2. Gangi also relies (at 32-33) on *Core Communications, Inc. v. Verizon Pennsylvania Inc.*, 493 F.3d 333 (3d Cir. 2007) ("*Core v. Verizon*"). The Third Circuit (unlike any other) did adopt a rule that "interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission." *Id.* at 344. The Third Circuit, however, had no cause to address whether that rule gave rise to a defense that was waivable or nonwaivable. The defense before it had been timely asserted. *See id.* at 336-37 (describing the case's procedural history).[20]

Indeed, the Third Circuit would likely agree that the defense it adopted was waivable. That court observed candidly that the 1996 Act gives "no real indication of what role the state commissions are to play, and . . . is simply silent as to the procedure for post-formation disputes" about interconnection agreements. *Core v. Verizon*, 493 F.3d at 340 (discussing

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to hear complaints seeking to enforce interconnection agreements, not the question whether that authority gave rise to a nonwaivable exhaustion defense in a federal court action. *See Brooks Fiber*, 235 F.3d at 497; *SW Bell v. PUC*, 208 F.3d at 480.

[20] Before the district court in *Core v. Verizon*, the Verizon affiliate that was a party to that case argued that the district court lacked subject-matter jurisdiction. That incorrect argument was rejected: the district court found that it had subject-matter jurisdiction, but dismissed on nonjurisdictional grounds. *See Core Communications, Inc. v. Verizon Pennsylvania Inc.*, 423 F. Supp. 2d 493, 497-98 (E.D. Pa. 2006), *aff'd in part, vacated in part, and remanded*, 493 F.3d 333 (3d Cir. 2007). On appeal, Verizon Pennsylvania revised its position and argued that the state commission had primary jurisdiction over Core's complaint because it involved technical issues. Verizon Pennsylvania neither advanced nor endorsed the exhaustion-type rule that the Third Circuit adopted.

47 U.S.C. § 252). Accordingly, the court relied on its own admittedly "broad[] reading" of the FCC's interpretation of the 1996 Act in its *Starpower* order.[21] *Id.* at 342. The Third Circuit, however, would agree with the First Circuit that a judge-made exhaustion requirement derived from a silent statute "is a non-jurisdictional affirmative defense" that must be preserved by timely assertion. *Metropolitan Life Ins. Co. v. Price*, 501 F.3d 271, 280 (3d Cir. 2007).

3. Gangi also relies (at 33-34) on *Illinois Bell Telephone Co. v. Global NAPs Illinois, Inc.*, 551 F.3d 587 (7th Cir. 2008) (Posner, J.). The questions necessary to the Seventh Circuit's judgment in that case were whether the district court had diversity jurisdiction over a dispute between a GNAPs affiliate and a subsidiary of AT&T, and personal jurisdiction over another GNAPs affiliate. The court held that it did, and therefore reversed the district court's contrary conclusion. *See id.* at 590, 597-98.

Illinois Bell also addressed in broad dicta the circumstances under which "issues that arise in the course of a federal suit to enforce an interconnection agreement may sometimes be within the 'primary jurisdiction' of the state regulatory agency." *Id.* at 594. Those dicta are not relevant here because GNAPs "expressly disavowed any desire . . . to invoke the discretionary doctrine of primary jurisdiction" in this case. Pet. App. 24a n.16.[22]

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[21] Memorandum Opinion and Order, *Starpower Communications, LLC*, 15 FCC Rcd 11277 (2000) ("*Starpower*").

[22] Gangi contends (at 33) that the Seventh Circuit was referring to "the doctrine of exclusive primary jurisdiction." As the First Circuit noted, this contention "ignores [the Seventh Circuit's] plain statement that the court was invoking discretionary and not exclusive primary jurisdiction." Pet. App. 25a; *see*

4. As Gangi concedes (at 35), the Second Circuit has reached a result on similar facts consistent with the First Circuit's decision in *GNAPs V*. *See Southern New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 135 (2d Cir. 2010) (rejecting GNAPs' argument that a federal court is "divest[ed] . . . of its jurisdiction over [a] claim" to enforce a federal tariff "when the provisions of an [interconnection agreement] are asserted in defense"). The only two circuits to have weighed in on the question actually presented are thus in accord. Gangi cites (at 37-39) various nonprecedential district court decisions that he claims support him. Disagreement that is limited to the district court level does not warrant review by this Court.

B. The First Circuit's Decision Was Correct

Review is also unwarranted because the First Circuit correctly rejected any exhaustion defense that GNAPs might have had. The court of appeals first concluded that the district court had subject-matter jurisdiction over this case under 28 U.S.C. §§ 1331 and 1367 because Verizon's counterclaim against GNAPs and Gangi was sufficiently related to the undisputedly federal claims that GNAPs raised in its 2005 Complaint and because Gangi could point to nothing that took that jurisdiction away. *See* Pet. App. 23a. Although he vigorously contested jurisdiction in the court of appeals, Gangi does not appear to do so now. *See* Pet. 37.

Illinois Bell, 551 F.3d at 595-96 (distinguishing a case referring to "'exclusive original jurisdiction'"); *id.* at 596 ("[W]e do not think the court need refer all disputes over an interconnection agreement to the state commission, only those where the dispute raises a genuine policy issue . . . .").

The First Circuit then held that, because any exhaustion requirement here did not limit the district court's subject-matter jurisdiction, it could be (and was) waived by GNAPs' failure to raise it in a timely fashion. *See* Pet. App. 24a-25a. That conclusion is strongly supported by *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), on which the First Circuit relied, and by other decisions of this Court.[23] And the facts of this case — in which GNAPs itself asserted a claim for charges to recover under an interconnection agreement, litigated for years in district court, and then belatedly tried to switch forums after unfavorable rulings made it seem likely that Verizon would prevail — confirm the wisdom of the rule. *See supra* pp. 9-10 & note 10.

The First Circuit's judgment could also be affirmed on the alternative basis that the Third Circuit erred in recognizing an exhaustion requirement to begin with. The Third Circuit, which is the only court of appeals to hold that such a requirement exists, based the requirement entirely on its reading of the FCC's order in *Starpower*. *See Core v. Verizon*, 493 F.3d at 341-44. But the FCC in *Starpower* did not rule that interconnection-agreement disputes must *always* go

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[23] *See Arbaugh*, 546 U.S. at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (explaining that a "claim-processing rule" that does not limit subject-matter jurisdiction, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the [Equal Employment Opportunity Commission] is not a jurisdictional prerequisite to suit in federal court, but a requirement that . . . is subject to waiver, estoppel, and equitable tolling.").

to state agencies first. Instead, it explained that state commissions have the responsibility to resolve such disputes in "some circumstances," but not in others, depending on the facts of the case and the terms of the dispute-resolution provision in the applicable interconnection agreement. *Starpower* ¶ 6 & n.14.

This case is not a suitable vehicle to consider the Third Circuit's conversion of *Starpower*'s fact-sensitive approach into an exhaustion rule, because the Court's holding would very likely instead rest on the waiver ground that the First Circuit adopted — as to which Gangi has shown no conflict. Nevertheless, this additional ground for affirmance further confirms that the First Circuit's judgment is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Frank Gangi,

Petitioner,

v.

Verizon New England, Inc., d/b/a Verizon Massachusetts et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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As the petition demonstrated, and Verizon does little to dispute, the circuits are divided over whether to apply the traditional presumption against federal preemption of state authority in the context of federal regulation of interstate telecommunications like dial-up. The First Circuit applied the presumption in this case, in conflict with the Second and Ninth Circuits, to hold that Massachusetts may regulate the prices telecommunications companies may charge for some calls to the internet (but not others), even though the FCC has issued orders[1] declaring that all such calls are jurisdictionally interstate and subject to a pricing regime intended to reduce, and eventually eliminate, intercarrier charges for internet-bound calls. That decision will have dramatic effects on small companies' abilities to compete with large incumbents like Verizon to offer internet access to underserved communities. While Verizon insists that this is what the Commission intended, the text of the relevant orders demonstrates a contrary intention, as other circuits have recognized. This Court should intervene and grant certiorari to restore uniformity to the nation's telecommunications policy.

Likewise, this case presents an opportunity to resolve ongoing confusion regarding the allocation of authority between state commissions and federal courts to resolve ICA disputes, a confusion which has led even Verizon itself to take inconsistent positions on the issue and which only this Court can resolve.

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[1] *ISP Remand Order*, ¶¶1, 7; *Second Remand Order*, ¶6.

I. Verizon Fails To Establish That The First Circuit's Decision On The Preemptive Effect Of The FCC's Orders Does Not Conflict With The Rulings Of The FCC And Other Circuits

Verizon goes to great lengths to avoid confronting the first issue raised in the Petition, whether states can impose tolls on a portion of a communication declared jurisdictionally interstate.[2] But it cannot credibly deny that the First Circuit on the one hand, and Second and Ninth Circuits on the other, have applied opposite rules regarding the preemptive effective of federal regulation of interstate telecommunications such as dial-up, or that different circuits have construed the same FCC orders to have a different scope and effect. Both conflicts have important consequences for federal telecommunications policy and this case presents an appropriate vehicle for resolving them.

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[2] As part of that strategy, Verizon resorts to an *ad hominum* attack, stating that the district court imposed sanctions on Mr. Gangi as a result of findings that he "'lied'" to the court, BIO 11. Such allegation is entirely irrelevant to the important legal rulings challenged in this petition. Petitioner nonetheless feels constrained to make clear that he strongly disagrees with Verizon's point and the factual findings of the courts below—there was no direct evidence that Mr. Gangi lied, and the district court's inferences of deceit from the ambiguous evidence before it were entirely unwarranted. Petitioner's failure to seek review of those findings here simply reflects his acknowledgment that the Court does not sit to correct such factual errors.

1. As the petition explained, and Verizon does not deny, the Ninth and Second Circuits have held that the presumption against preemption does not apply to federal regulation of interstate telecommunications and the innovative services the TCA was passed to promote. Pet. 17-19; *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003)[3]; *New York SMSA Ltd. v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). Nor does Verizon deny that the First Circuit applied the opposite rule in this case, *see* Pet. App. 20a, 101a. Instead, Verizon simply points out that the Second and Ninth Circuits resolved the presumption question in cases that involved different telecommunications services. BIO 15. But that factual distinction cannot obscure the circuits' fundamental disagreement over the proper legal test for preemption claims arising from federal regulation of interstate telecommunications and services like dial-up, whose growth the TCA facilitated.

Nor does Verizon dispute that the question of the proper presumption was of critical importance here. *See* Pet. App. 111a ("We find that there is a lack of clarity about whether the *ISP Remand Order* preempts state regulation of the access charges at issue here. Given the requirement of a clear indication that the FCC has preempted state law, the *ISP Remand Order* does not have the broad

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[3] Verizon notes that *Ting* addressed the preemptive effect of a statute, instead of a regulation, BIO 16, but cites to no authority holding that this distinction makes any legal difference.

preemptive effect that Global NAPS seeks to assign to it."); *id.* at 108a (noting that FCC staff stated that the 2001 Order "'can be read to support the interpretation set forth by either party'").

2. The First Circuit's erroneous presumption was compounded by its misconstruction of the scope of the FCC's orders, in conflict with their intent and the decisions of other courts.

a. Verizon insists that the First Circuit properly construed the orders, but largely ignores their text, relying instead on snippets from briefs filed by the Commission's staff attorneys in this and other cases. BIO 24-25. But the orders are clear and the briefs do not cast any doubt on the orders' plain meaning.

As the petition demonstrated, Pet. 7, in the 2001 Order, the FCC explained that it was setting a cap for *all* ISP-bound calls – not simply calls to local ISPs– stating that "the record indicates a need for immediate action with respect to *ISP-bound traffic*." ¶7 (emphasis added). The FCC then encompassed all ISP-bound calls in its new rate structure, explaining that it "adopt[ed] a gradually declining cap on the *amount that carriers may recover from other carriers for delivering ISP-bound traffic*." ¶7 (emphasis added); *see also* ¶82 ("[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue."). Thus, even if the Commission's attention was initially directed to the question of ISP-bound call pricing by cases involving local calls to ISPs, *cf.* BIO 24-25, the FCC clearly decided, when it issued its *ISP Remand Order*, to apply its new rule to all ISP-bound calls. Indeed, the

Commission issued a proposed rulemaking on the same day as that order, dealing with all ISP-bound calls, including VNXX calls.[4] Nor has Verizon offered any reason why the FCC would intend to apply a uniform national rule to some calls to the internet, but leave others to the patchwork regulation of 50 state agencies.

Instead, Verizon relies on the FCC staff attorneys' statements in the amicus brief in this case. BIO 24-25. But that brief – which the authors stated did not represent the official views of the Commission itself[5]– does little to support Verizon's interpretation. The brief acknowledges that "the *ISP Remand Order* can be read to support the interpretation set forth by *either party*," *id.* at 13 (emphasis added), and that "the *ISP Remand Order* is also replete with references to 'ISP-bound calls' that do *not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas*," *id.* at 11 (emphasis added).

Verizon also relies on statements in FCC briefs to the D.C. circuit in the cases involving Core Communications' mandamus petition, even while insisting that those proceedings "had nothing to do" with the issues here. BIO 17; *see id.* at 17-18, 25.

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[4] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) (*2001 NPRM*) ¶115.

[5] FCC Br. 13 (stating "it would not be possible for the Commission's litigation staff to provide an official position").

But Verizon misconstrues those statements.[6] If anything, the FCC's briefs support petitioner's position. *See* Pet. 23.

Rather than attempting to triangulate the FCC's position from several statements addressing other issues in different cases, the Court should resolve any ambiguity about the Commission's interpretation of its orders by calling for the views of the Solicitor General (who, unlike the staff attorneys charged with filing the First Circuit amicus brief, presumably will be able to represent the Commission's authoritative position).

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[6] In the 2010 D.C. Circuit proceeding, for example, the Commission's brief acknowledged that the Orders applied to local calls, BIO 25, but did not say that they were limited to such communications. To the contrary, the same brief emphasized, "it is not the law that the intrastate segment of end-to-end interstate traffic falls outside the Commission's section 201(b) ratemaking authority." FCC Br. 31. Likewise, the FCC's statement in an earlier proceeding involving Core's petition, that the "*ISP Remand Order* did not address the regulatory treatment of VNXX calls," BIO 17, merely meant that it had not yet determined how it would exercise its authority as to operational aspects of VNXX calls. The FCC's statement certainly did not mean that it had temporarily left pricing authority over VNXX calls with the states. In any case, the *Second Remand Order* made clear that the Commission was exercising jurisdiction over all ISP-bound calls, stating it had jurisdiction to regulate ISP-bound calls under section 251(b)(5) of the TCA, which it stated applies to all telecommunications, and is "not limited . . . to particular services ('telephone exchange service,' 'telephone toll service' or 'exchange access')." ¶8 (internal citations omitted).

b. Verizon's attempts to reconcile the circuits' views of the FCC orders, BIO 17-19, fail as well. While the Fourth and D.C. Circuits have not directly confronted the question presented here, each has given careful attention to the meaning of the FCC orders and reached conclusions incompatible with the decision in this case. Pet. 24-25. Verizon implies that the D.C. Circuit expressly agreed with the First Circuit's decision in this case, BIO 18, but that suggestion is entirely misleading. In the passage cited, the D.C. Circuit simply stated that "the parties agree that the link between the LEC and the interexchange carrier is *not* governed by the reciprocal compensation regime of § 251(b)(5)," and cited a brief that, in turn, cited a portion of the First Circuit's 2006 opinion that cited an FCC order describing the general distinction between local and interexchange traffic. *Core Communications v. Federal Communications Comm'n*, 592 F.3d 139, 144 (D.C. Cir. 2010).

3. Verizon argues that review is not warranted because dial-up is an issue of declining importance. BIO 21-22. But that claim is belied by the fact that numerous states continue to fight for the right to regulate it and the FCC has initiated (and maintains) a proposed rulemaking dealing with it.[7] In fact, dial-

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[7] *2001 NPRM*, docket available at: http://fjallfoss.fcc.gov/ecfs/proceeding/view?z=gzwj&name=01-92; *see* Arizona Corp. Comm'n docket Nos. T-0151B-05-0414, T-03654A-05-0415, available at https://edocket.azcc.gov/; Washington Utils. and Transp. Comm'n docket Nos. UT-053036, UT-053039, available at http://wutc.wa.gov/rms2.nsf/frm2005VwDSWeb!OpenForm&vw2

up remains the only access many Americans have to the internet, particularly in rural or remote areas, where access is especially important to connecting small businesses to the broader economy and affording families educational and other benefits often unavailable through any other means. *See, e.g.*, FCC, National Broadband Plan,[8] at xi ("[a]pproximately 100 million Americans do not have broadband at home"); *id.* at 23 (noting that data suggests that "fewer than 10% of residents on Tribal lands have terrestrial broadband available"); *id.* (describing income and racial disparities in broadband access). Given the high per capita cost of delivering broadband to less populated areas, such communities will remain reliant on dial-up access for some time. *See id.* at 21 ("It is unlikely there will be a significant change in the number of unserved Americans based on planned upgrades over the next few years . . . .").

Further, the issue of state regulation of legs of interstate telecommunications is relevant to the pricing of VoIP traffic, which is growing in importance. Pet. 30.

4. Finally, Verizon argues that this case is an inappropriate vehicle to resolve the important issues it presents because, Verizon says, petitioner's arguments are barred by the *res judicata* effect of the First Circuit's 2006 decision in these consolidated

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[8] *Available at* http://broadband.gov/download-plan/.

cases. Neither the First Circuit nor the district court[9] accepted Verizon's *res judicata* argument, and for good reason. As the First Circuit has explained, when "there was only a final judgment on a portion of the aggregate [consolidated] case," the "application of res judicata in this case [i]s inappropriate." *Bay State HMO Management Inc. v. Tingley Systems*, 181 F.3d 174, 178-79 (1st Cir. 1999) (emphasis added); *see also Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121, 128-29 (2d Cir. 1999).[10] And as Verizon acknowledges, BIO 23 n.17, a party's failure to seek certiorari on an interlocutory basis is no bar to this Court's review when the entire case is concluded.[11]

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[9] Verizon claims, BIO 11 n.13, petitioner misquoted the district court by asserting that Judge Zobel stated that the court's determinations occurring prior to the FCC's issuance of the 2008 order were "law of the case." Petitioner put the phrase "law of the case" in quotations to mark it as a term of art, not to claim that the words were spoken by Judge Zobel. Moreover, the term accurately describes the Judge's statement that FCC's *Second Remand Order* "cannot undo everything that's happened in the case over the last eight years." C.A. App. 2062. Notably, while Verizon criticizes petitioner's punctuation, it does not actually claim that the court based its decision on *res judicata* principles rather than law of the case. *See* BIO 11, n.13, 22-23.

[10] Verizon's citation to cases involving subsequent litigation over implementation of an injunction, BIO 23 n.17, is inapposite. Neither decision involved an appeal at the conclusion of the litigation of two consolidated cases.

[11] Verizon's *res judicata* claim fails for the additional reason that petitioner does not seek to relitigate any *claim* he lost in the prior appeal, but rather seeks review of an *issue* decided in the first appeal that is relevant to Verizon's present counterclaim. *See* Restatement (Second) of Judgments §17

II. Verizon Fails To Refute That The First Circuit's Waiver Ruling Creates A Split Among The Circuits As To The Permissible Grounds For Allowing A Cognizant State Commission To Be Bypassed

Certiorari is independently warranted to resolve a circuit conflict regarding the authority of federal courts to resolve disputes over the meaning of an ICA imposed by a state utility commission.

1. Verizon does not dispute that the distribution of adjudicatory authority between federal courts and state commissions is a question of recurring importance in telecommunications law. Nor can it deny that the question has been the source of much debate and confusion – it acknowledges it has taken inconsistent positions on the issue. BIO 27 n.20; *see also* Pet. 40 (noting Verizon's differing positions in different cases).

(1982) (*res judicata* bars relitigation of claims, not issues). Verizon did not assert in the First Circuit or in its opposition that petitioner is barred by issue preclusion from challenging the First Circuit's construction of the preemptive effect of the FCC orders. *See* Verizon C.A. Br. 55 ("[T]he relevant principle here is *res judicata*, or claim preclusion"); *id.* 82-83 (arguing that collateral estoppel applied to bar relitigation of a different question). Accordingly, any issue preclusion argument is waived. *See* S.Ct. R. 15.2. Furthermore, the First Circuit's 2006 ruling would warrant reconsideration in any event in light of the FCC's subsequent clarification of its original order in its 2008 *Second Remand Order*. *See* Restatement (Second) of Judgments § 28(2)(b); *Montana v. United States*, 440 U.S. 147, 161 (1979).

Verizon further acknowledges that the Third Circuit has held that disputes over the meaning or enforcement of an ICA "*must* be litigated in the first instance before the relevant state commission." BIO 27 (quoting *Core Communications v. Verizon Pa.*, 493 F.3d 333, 344 (3d Cir. 2007)) (emphasis added). It insists, however, that despite this unambiguously mandatory language, "the Third Circuit would likely agree that the defense it adopted was waivable," BIO 27, because the statute is "'silent as to the procedure for post-formation disputes,'" *id.* (quoting *Core*, 493 F.3d at 340), and because "a judge-made exhaustion requirement derived from a silent statute 'is a non-jurisdictional affirmative defense,'" BIO 28 (citation omitted). But that claim misconceives the basis of the Third Circuit's decision, which did not adopt an "exhaustion" requirement as a matter of judicial interstitial lawmaking, but instead enforced an allocation of authority it found established in the structure of the statute. 493 F.3d at 342-43. The Third Circuit agreed with the Eleventh that "to allow parties to circumvent the state commissions in post-formation disputes would undermine the Act's sense of cooperative federalism, under which the states were given primary responsibility over interconnection agreements." *Id.* at 343 (citing *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 n. 9 (11th Cir. 2003) (en banc)).

That rationale is entirely inconsistent with treating the Third Circuit's rule as a waivable exhaustion requirement. Enforcement of a rule protecting the TCA's division of authority between states and the federal government, based on a recognition of states' superior expertise, cannot turn

on the diligence of parties in asserting the states' prerogatives.

2. Verizon also wrongly asserts that only the Third Circuit has ruled contrary to the First concerning state commissions' primary jurisdiction to interpret, in the first instance, disputed ICA clauses. BIO 26-28; *contra* Pet. 31-34. For example, although Verizon dismisses as dicta the Eleventh Circuit's discussion of the statutory scheme, there can be little question that courts within that circuit could not have adjudicated Verizon's counterclaim here, consistent with *BellSouth Telecomms.*, 317 F.3d at 1278 n. 9.

Verizon similarly dismisses the Fifth Circuit's discussion of state commissions' "plenary" authority to resolve enforcement disputes. *See* BIO 26-27 n.19 (discussing *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000)). But at least one district court within that circuit has treated that case as authoritative, citing its ruling as requiring dismissal of a breach of ICA claim because it had not been presented to the relevant state commission. *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 548-50 (E.D. Tex. 2004).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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